Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

JOHN F. BYRNES, ET AL.,

*Respondents.*

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

IRMA M. ALICEA, ET AL.,

*Respondents.*

**On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR WRITS OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"), authorizes claims that welfare plan benefits have "vested" prior to or upon retirement despite the absence of clear and express vesting language in the applicable plan documents.

2. Whether the court of appeals erred in holding that ERISA authorizes breach of fiduciary duty claims against an employer for amending a welfare plan to modify benefits or for failing to disclose that benefits could be reduced or terminated under the plan.

## PARTIES TO THE PROCEEDINGS

*Empire Blue Cross and Blue Shield v. Byrnes, et al.*:

The following individuals were plaintiffs-appellants in the court below: John F. Byrnes, Sterling E. Cathey, William A. DeMauro, Jerrold I. Ehrlich, Michael Elkins, Beverly Glickerman, Eugene F. Harrison, Gerald Harrison, Richard G. Kunkel, Jules K. Lambek, Louis L. Levine, John F. Luczun, John F. Muldoon, Joseph G. Murphy, Harry E. Nicholsen, Ellen H. Propp, Daniel Rosenberg, Daniel G. Sanders, John L. Shurtleff, James C. Snyder, Anthony J. Truhon, John Wandzilak, Jr., and Ronald D. Zammit. In addition, Francis J. Devlin was a plaintiff in the trial court proceedings but withdrew from the action prior to the initiation of proceedings in the court below.

*Empire Blue Cross and Blue Shield v. Alicea, et al.*:

The following individuals were plaintiffs-appellants in the court below: Irma M. Alicea, Jack Brook, Joseph L. Cerone, Jr., Arthur English, Joseph Fleming, Anthony Heckel, Marie Morris, Ann Musto, Rose Marie O'Connor, Elaine Bailey-Pereira, James Photis, John Pirro, Henry Reynolds, Albert Ricuito, Sheila Sansoti, and Gerard Sussungham. In addition, the following individuals were plaintiffs in the trial court proceedings but did not choose to prosecute the matter on appeal: Calogera Abbruscato, Sal Autolino, Genevieve Banger, Estate of Joanna W. Blackwood, Marie Bramson, Catherine Brandoff, Erna Seals-Brown, Vincent Carlin, Vincent Cefola, Elaine Cirino, Vincent Cirino, Timothy Connors, Juanita R. Evelyn, Jeanette Graves, Eustace Griffith, Thomas Hughey, Elaine V. Hutton, Ralph Leggett, Barbara L. McCarthy, John O. McGee, Maria Mele, John Merolla, Lula Mae Miller, Robert Novas, Cyrilla R. Palermo, Albert Pedota, Mary Purcell, Mary A. Reiday, Neville Sargeant, George Schirm, Daphne Small, Sheila Sparling,

Mary Hoffmeister-Travers, Martin Varley, John D. Vella, Howard Walsh, and Gwen Zucker.

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Empire Blue Cross and Blue Shield, now known as Empire HealthChoice, Inc., states that it is not publicly held, it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Empire Blue Cross and Blue Shield ("Empire") respectfully submits this petition for writs of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.[1] Review is warranted because the questions presented raise recurring issues of paramount importance regarding the proper tests for determining whether ERISA welfare plan benefits have "vested" and the extent (if any) to which employers may be held liable as ERISA "fiduciaries" for eliminating or modifying welfare plan benefits under ERISA. These questions have generated multiple circuit conflicts and arise frequently in the lower courts, and the decisions below exacerbate and sharpen these widening conflicts. This Court's review is essential to resolve the conflicts highlighted by the decisions below and to clarify this important area of the law.

## OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-24a (*Byrnes*), 25a-46a (*Alicea*))[2] are reported at 274 F.3d 76 and 274 F.3d 90, respectively. The opinions of the United States District Court for the Southern District of New York granting Empire's motions for summary judgment (App., *infra*, 47a-68a, 69a-82a) are not reported.

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[1] In accordance with this Court's Rules, this petition seeks review of two judgments of the United States Court of Appeals for the Second Circuit which involve "identical or closely related questions." SUP. CT. R. 12.4.

[2] Francis J. Devlin and Calogera Abbruscato, the lead plaintiffs listed in the case captions of the two opinions below, did not perfect appeals to the Second Circuit. Accordingly, respondents John F. Byrnes and Irma M. Alicea, respectively, have been designated as lead respondents for purposes of this petition.

## JURISDICTION

These cases arise under ERISA, and the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgments of the district court pursuant to 28 U.S.C. § 1291. The judgments of the court of appeals were entered on December 6, 2001. The court of appeals granted Empire's motions to file its petitions for rehearing on January 14, 2002, and January 17, 2002, respectively. App., *infra*, 90a-92a, 93a-95a. On February 26, 2002, and February 27, 2002, respectively, the court of appeals denied Empire's petitions for rehearing. *Id.* at 83a-84a, 85a-86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of ERISA are set forth at App., *infra*, 87a-89a.

## STATEMENT OF THE CASE

### I. Statutory Background

ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 712 (2002) (citation omitted). The statute establishes a detailed regulatory scheme governing two broad categories of employee benefit plans: (1) pension plans, which provide retirement or deferred income to employees, 29 U.S.C. § 1002(2)(A); and (2) welfare plans, which provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1).

In promulgating ERISA, Congress was concerned that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vest-

ing provisions in [their pension] plans." 29 U.S.C. § 1001(a). ERISA therefore imposes detailed vesting rules for pension plans that specifically mandate the vesting of pension benefits. *See* 29 U.S.C. § 1053. By contrast, Congress chose *not* to require vesting of welfare plan benefits. Indeed, ERISA expressly *exempts* welfare plans from its complicated vesting provisions, leaving employers free to amend such plans at will. *See* 29 U.S.C. § 1051(1) ("[t]his part [governing, among other things, the vesting of benefits] shall apply to any employee benefit plan . . . other than . . . an employee welfare benefit plan"). As this Court has recognized, "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, welfare plan benefits, including health and life insurance benefits, *do not vest* except in the rare circumstance in which an employer makes a binding extra-statutory vesting commitment in the plan documents.

ERISA imposes fiduciary obligations on employers and others that perform certain managerial and administrative tasks with respect to ERISA plans. Whether an employer has fiduciary obligations to plan participants and beneficiaries turns, not on the holding of any particular title, such as "plan administrator," but rather on the function being performed by the employer. An employer that is also an ERISA plan administrator wears "two hats" with respect to the plan, and acts in its fiduciary capacity only when it performs one or more of the "fiduciary functions" set forth in ERISA. Those functions include exercising "discretionary authority or control" over plan management and having "discretionary responsibility in . . . [plan] administration." 29 U.S.C. § 1002 (21)(A). As this Court has made clear, however, amending a welfare plan is *not* a fiduciary function under ERISA. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.").

## II. Factual Background

Respondents are former Empire employees who retired between 1989 and 1998 and are eligible for life insurance benefits under Empire's Basic Group Life Insurance Plan (the "Plan"). App., *infra*, 2a, 27a, 47a-48a, 69a.

Empire prepared and distributed to all of its employees summary plan descriptions ("SPDs") for the Plan.[3] The SPDs explained that eligible employees were entitled to life insurance benefits equivalent to two times their basic annual salary. App., *infra*, 4a-5a, 48a. With respect to post-retirement benefits, the SPDs distributed prior to 1987 stated that retirees' life insurance would remain at a level equivalent to their annual salaries for the remainder of their lives. The pre-1987 SPDs did not, however, contain any express statement that benefits would vest or that Empire was waiving its well-established right under ERISA to modify or terminate welfare benefits at will. *Id.* at 4a-5a, 54a.

In 1987, Empire revised the SPD. Like the earlier versions, the 1987 document stated that 50% of retirees' life insurance coverage would "remain[] in force for the rest of [their lives] at no cost to [them]." App., *infra*, 5a, 28a, 49a, 73a (emphases omitted). In addition, the 1987 SPD included an express reference to Empire's right to amend or terminate retirees' life insurance benefits: "The company expects and intends to continue the Plan[] . . . indefinitely, but reserves its right to end . . . the Plan[], if necessary. The company also reserves its right to amend . . . the Plan[] at any time." *Id.* at 5a-6a, 28a, 50a, 74a. Subsequent SPDs contained similar reservation-of-rights language.

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[3] ERISA entitles participants and beneficiaries to summary plan descriptions, which are easy-to-read explanations of available benefits. *See* 29 U.S.C. § 1022(a); 29 U.S.C. § 1024(b)(1).

A number of respondents retired pursuant to early retirement programs in 1992 (the Voluntary Separation Opportunity Program ("VSOP")) and 1993 (the Voluntary Incentive Program ("VIP")). The VSOP and VIP documents referred to life insurance for eligible retirees as a "lifetime" benefit, but also expressly referenced Empire's unqualified right to amend or terminate the early retirement programs and to adopt new and different programs in the future. App., *infra*, 6a-7a, 28a-30a, 58a-59a, 74a-75a.

In 1998, Empire amended the Plan to reduce respondents' life insurance benefits. App., *infra*, 7a, 30a-31a, 50a.

## III. Proceedings In The District Court

Respondents filed two ERISA suits against Empire in the United States District Court for the Southern District of New York. In both cases, respondents alleged that their life insurance benefits had vested at pre-amendment levels and sought to recover those benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In addition, respondents alleged that Empire breached fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), by amending the Plan in violation of its terms and by making purported misrepresentations to respondents regarding their benefits. The fiduciary duty claims purportedly arose under ERISA § 502(a)(3), which allows participants and beneficiaries in certain circumstances to sue to enjoin acts that violate ERISA or an ERISA plan.[4] The parties filed cross-motions for summary judgment, and the district court ruled in favor of Empire on all issues. App., *infra*, 47a-68a, 69a-82a.

The district court held that the reservation-of-rights language in the 1987 SPD and the VSOP and VIP documents

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[4] Respondents' complaints also contained additional claims based on the doctrine of promissory estoppel, as well as allegations that Empire violated ERISA by failing to provide plan information upon request.

was sufficient to rebut respondents' claims to vested life insurance benefits. App., *infra*, 58a-61a, 78a. In *Byrnes*, the court also rejected respondents' argument that their life insurance benefits had vested under the pre-1987 SPDs. Observing that the *Byrnes* respondents retired *after* the 1987 SPD was distributed, the court concluded that the pre-1987 SPDs did not contain "clear and express language" expressing an intent to vest employees with life insurance benefits *before* they retired, and therefore held that respondents' claims were governed by the plan documents that were in effect at the time of their retirement. *Id.* at 54a-58a.

On the fiduciary duty issue, the district court held that Empire's reduction in retiree life insurance benefits was consistent with the plan documents. App., *infra*, 63a-64a, 79a. The court rejected the contention that Empire misled respondents regarding their rights to benefits under the Plan. *Id.* at 64a-65a, 79a. The court explained, moreover, that Empire could not be liable as a fiduciary under ERISA because plan amendment is not a fiduciary function. *Id.* at 63a-64a n.2.

## IV. Proceedings In The Court Of Appeals

The Second Circuit vacated the district court's decision in *Byrnes*, affirmed in part and reversed in part in *Alicea*, and remanded for further proceedings. App., *infra*, 1a-24a, 25a-46a. With respect to the vesting issue, the court of appeals rejected the district court's holding that the pre-1987 SPDs and the VSOP and VIP documents could not support respondents' claims to vested benefits. *Id.* at 9a-15a, 34a-36a. The court of appeals also rejected the district court's conclusion that Empire could not be held liable for breach of fiduciary duty. *Id.* at 18a-23a, 43a-46a.[5]

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[5] The court of appeals also rejected other aspects of the district court's decision with respect to respondents' promissory estoppel claims and, in *Byrnes*, respondents' claim that Empire unlawfully failed to provide requested plan information. App., *infra*, 16a-18a, 23a-24a, 41a-43a.

### A. Contractual Vesting

The Second Circuit began its analysis of the vesting issue by holding that ERISA plan beneficiaries can avoid summary judgment on a claim that welfare plan benefits have "vested" merely by "point[ing] to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest . . . benefits." App., *infra*, 12a (second alteration in original, internal quotation marks, emphasis, and citations omitted). The court expressly rejected the contrary rule adopted by the Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), which requires a vesting "promise that is 'clear and express[,]'" or "'precise language denying the right to withdraw benefits.'" App., *infra*, 11a (citing *Wise*, 986 F.2d at 937-38). Indeed, the court below emphasized that it had "rejected *Wise* twice before." App., *infra*, 12a. The Second Circuit accordingly adhered to its view that plaintiffs claiming vested welfare benefits can "get to a trier of fact based on ambiguous plan language." *Id.*

Applying its "ambiguous plan language" test, the Second Circuit held in *Byrnes* that certain statements in the pre-1987 SPDs were independently "capable of reasonably being interpreted" as promises to vest life insurance benefits. App., *infra*, 12a-15a. The court rejected Empire's reliance on the reservation-of-rights language in the 1987 SPD and the VSOP and VIP documents, reasoning that if respondents' life insurance benefits had vested under the earlier SPDs, they were not subject to the terms of later plan documents, even though respondents did not retire until after receiving the 1987 SPD. *Id.* at 14a, 14a n.6. The Second Circuit remanded *Byrnes* to the district court for "the ultimate determination of whether Empire promised [respondents] lifetime benefits" in the pre-1987 SPDs. *Id.* at 15a.

Respondents in *Alicea* did not rely on the pre-1987 plan documents, and accordingly the court of appeals in that case

entertained Empire's arguments regarding the reservation-of-rights language in the later Plan documents. The court agreed with Empire and the trial court that the 1987 SPD preserved for Empire the unqualified and unambiguous right to amend retiree life insurance benefits at its discretion. The court accordingly affirmed the district court's decision in Empire's favor with respect to those respondents who relied exclusively on the language in the 1987 SPD. App., *infra*, 36a-40a.[6] But with respect to the VSOP and VIP documents, the court found them to be ambiguous with respect to the vesting issue and accordingly remanded for the district court to resolve the perceived ambiguity. *Id.* at 34a-36a.

**B. Breach Of Fiduciary Duty**

The Second Circuit also set aside the district court's dismissal of respondents' claims for breach of fiduciary duty. App., *infra*, 18a-23a, 43a-46a. Empire argued that respondents' fiduciary duty claims fail under this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), which held that participants could bring individual breach of fiduciary duty actions under ERISA § 502(a)(3), but "that where Congress elsewhere provided adequate relief for a[n] . . . injury, there will likely be no need for further equitable relief" under § 502(a)(3). *Id.* at 515. Empire asserted, consistent with the decisions of other federal courts of appeals, that *Varity* precludes participants and beneficiaries from bringing individual breach of fiduciary duty claims under § 502(a)(3) when a claim for benefits can be asserted under § 502(a)(1)(B). The Second Circuit rejected this reading of *Varity*, holding that this Court "did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to en-

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[6] The court suggested, however, that those respondents might be able to file an amended complaint incorporating the vesting theory adopted by the *Byrnes* respondents based on the pre-1987 plan documents. App., *infra*, 40a-41a n.7.

force the terms of a plan, and § 502(a)(3) for breach of fiduciary duty." App., *infra*, 23a.

The Second Circuit also rejected the district court's holding that Empire was not acting as a fiduciary when it amended the plan to reduce respondents' life insurance benefits. App., *infra*, 19a-20a, 45a. Although the court conceded that amending a benefits plan is generally not a fiduciary function, it nonetheless held that Empire could be found to have violated ERISA's fiduciary provisions if its "decision to reduce benefits [constituted] a breach of a contractual promise to vest such benefits." *Id.* at 20a.

Finally, the Second Circuit overturned the district court's holding that Empire had no fiduciary obligation to disclose that the Plan's benefits were not vested. The court held that Empire's distribution of documents that "promised lifetime benefits but failed to note that Empire could reduce or terminate the[] benefits at any time" could give rise to liability for breach of fiduciary duty. App., *infra*, 21a.

## REASONS FOR GRANTING THE WRIT

This Court has frequently recognized "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). In enacting ERISA in 1974, Congress itself emphasized the pervasive significance of employee benefit plans to our nation's economy, noting that "the continued well being and security of millions of employees and their dependents are directly affected by these plans" and that ERISA plans "are affected with a national public interest." 29 U.S.C. § 1001(a). In recognition of the important role of ERISA plans and the compelling need for certainty and clarity in this heavily litigated area of the law, this Court has frequently granted review to resolve disputes over the proper interpretation of this comprehensive statute. *See, e.g., Great-West Life & Annuity Ins.*

*Co. v. Knudson*, 534 U.S. 204 (2002); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Pegram v. Herdrich*, 530 U.S. 211 (2000); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). This case presents another such opportunity and necessity, because the decisions below resolve questions of great significance for the administration of ERISA plans in a manner that conflicts with the decisions of numerous other federal courts of appeals.

The first question presented concerns the proper test for determining whether welfare benefits have "vested" and are therefore inalterable. The vesting rule adopted and adhered to by the court below conflicts with the rule applied in other circuits and undermines the intent of Congress in exempting welfare plans from ERISA's detailed vesting requirements. This issue is of fundamental importance to employers and to the proper functioning of ERISA's regulatory scheme, because the legal standard for determining whether welfare benefits have vested directly affects the extent to which employers will be permitted to adjust welfare plan benefits in response to changing economic and market conditions.

The second question presented involves a circuit conflict over the interpretation and effect of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The Second Circuit held below that respondents were entitled to proceed against Empire on both their claim for breach of fiduciary duty under ERISA § 502(a)(3) and their claim for denial of benefits under ERISA § 502(a)(1)(B). Every other court of appeals to address the question has concluded, in keeping with this Court's reasoning in *Varity*, that § 502(a)(3) does not authorize a cause of action in these circumstances. In addition, the Second Circuit also departed from this Court's precedents and further exacerbated the conflicts among the lower courts by improperly expanding ERISA's definition of "fiduciary" and the scope of the fiduciary duties imposed by

ERISA. For the reasons set forth below, this Court should grant certiorari to resolve these important and intractable disagreements over critical issues of ERISA law.

## I. Review Is Warranted To Resolve The Conflict Over The Proper Test For Determining Whether ERISA Welfare Plan Benefits Are "Vested"

### A. The Courts Of Appeals Are Divided Over The Question Whether "Clear And Express" Vesting Language Is Required

Claims that ERISA welfare plan benefits have "vested" by virtue of ERISA plan language arise with great frequency in the federal courts. There exists a voluminous body of federal case law relating to the contractual vesting of welfare benefits, and the courts of appeals are solidly split regarding the legal standard that plaintiffs must satisfy to prevail in these cases. The Second Circuit below, adhering to and reaffirming its own precedent, held that a retiree can reach a trier of fact on a contractual vesting claim simply by pointing to ambiguous language that could be construed as a promise. While the Seventh, Eighth, and Eleventh Circuits take a similar approach to this issue, the Third, Fourth, Fifth, Sixth, and Tenth Circuits have adopted a contrary rule, and require "clear and express" vesting language before an ERISA welfare plan can be deemed to create any vested rights.

#### 1. The Second Circuit's Approach

The court below allowed respondents to proceed with their claims for vested benefits on the ground that certain plan documents contained language capable of being interpreted to provide a vested lifetime life insurance benefit. App., *infra*, 15a, 35a. The court explained: "In this Circuit, to avoid summary judgment on an ERISA contractual vesting claim, plaintiffs need only identify 'specific written language that is reasonably susceptible to interpretation as a promise.'"

*Id.* at 34a (citing *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999)). "Our standard," the court noted, "permits a plaintiff to get to a trier of fact based on ambiguous plan language." App., *infra*, 12a. The court expressly declined to require "clear and express" vesting language, noting that it had "rejected [that standard] twice before." *Id.* Thus, under the Second Circuit's test, a plaintiff can prevail merely by pointing to ambiguous language and providing sufficient extrinsic evidence to persuade the trier of fact to construe the ambiguous language in his favor.

The Seventh Circuit concurs with the Second Circuit's position that clear vesting language is unnecessary. In *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000), for example, the Seventh Circuit held that a plaintiff is entitled to a trial on a claim for contractually vested welfare benefits so long as "there is language . . . [in the applicable plan documents] to suggest a grant of lifetime benefits, and the suggestion is not negated by the agreement read as a whole." *Id.* at 547. Similarly, in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), the Seventh Circuit permitted retirees to proceed with a claim for vested welfare benefits based on ambiguous language. *Id.* at 605. The *Bidlack* plurality opinion rejected "the . . . position[] . . . that the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire." *Id.* at 607.[7]

The Eighth and Eleventh Circuits have likewise held that ambiguous vesting language can suffice to defeat summary judgment and create a factual question on the "vesting" issue.

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[7] Though *Bidlack* and *Rosetto* both involved collective bargaining agreements rather than unilaterally implemented benefit plan documents, the court in *Rosetto* held that the same standard governs both types of cases. *See Rosetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is.").

*See, e.g., Jensen v. Sipco, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994) (finding for retirees where vesting language was "at most an ambiguous expression of an intent to vest retiree benefits"); *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 702-03 (11th Cir. 1993) (holding that retirees could demonstrate a substantial likelihood of success on claim for vested health insurance benefits where language in the applicable collective bargaining agreement "could reasonably be interpreted to require [the employer] to provide benefits to qualifying employees throughout retirement").

### 2. The "Clear And Express Language" Test

In contrast to the foregoing decisions, other circuits have held that a claim to vested benefits cannot be supported by merely ambiguous plan language combined with extrinsic evidence; instead, clear and express language in the actual plan documents is required. These courts reason that because ERISA expressly exempts welfare benefits from its vesting provisions, an extra-statutory commitment to vest such benefits cannot be inferred absent a clear expression, in the applicable plan documents, of an intent to achieve that result.

The Fifth Circuit, for example, holds that an intent to vest welfare benefits "must be found in the plan documents and must be stated in clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993). Under this test, "[p]laintffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation" of the employer's right to amend. *Id.* at 938. In *Wise*, retirees sued to recover allegedly vested health insurance benefits. The plan documents were "silent" on the issue of vesting, containing no clear expression of an intent on that issue. *Id.* at 932. The court held that welfare benefits could not vest in such circumstances, reasoning that "specific language establishing a vesting of health benefits" is required. *Id.* at 938.

The Sixth Circuit follows the same approach, requiring claimants to point to clear and express language in plan documents. In *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998), for example, the court rejected a contractual vesting claim because the applicable "plan documents . . . [did] not express a clear and affirmative intent to vest employees' welfare benefits." *Id.* at 667-68. *Accord Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) ("[A]n employer's commitment to vest [welfare] benefits is not to be inferred lightly; the intent to vest 'must be . . . stated in clear and express language.'") (citing *Wise*, 986 F.2d at 937). *See also Voyk v. Bhd. of Locomotive Eng'rs*, 198 F.3d 599, 602 (6th Cir. 1999) (same).

Numerous other authorities, including decisions from the Third, Fourth and Tenth Circuits, are to the same effect. *See, e.g., UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999) ("[T]o vest [welfare] benefits is to render them forever unalterable. Because vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language."); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996) ("Contractual vesting of a welfare benefit is an extra-ERISA commitment that 'must be stated in clear and express language.'") (citing *Wise*, 986 F.2d at 937); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) ("Because . . . an obligation [to provide vested welfare benefits] constitutes an extra-ERISA commitment . . . courts may not lightly infer the existence of an agreement to vest employee welfare benefits. Rather, in recognition of ERISA's requirement that employee benefit plans be governed by written plan documents . . . any participant's right to a fixed level of lifetime benefits must be . . . stated in clear and express language.") (internal quotation marks and citations omitted). *See also Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) (citing *Wise* for clear and express language requirement).

As the foregoing discussion makes clear, there is a widespread circuit conflict over the question presented here. Indeed, the court below expressly acknowledged the "circuit split as to the summary judgment rules for contractual vesting," App., *infra*, 12a, and it also highlighted this conflict in previous decisions. *See American Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("[W]hen the documents are ambiguous as to whether retiree medical benefits are vested, the circuits disagree as to how the documents should be interpreted."). Other courts have similarly recognized the widespread division of authority on this issue. *See, e.g., Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) ("Cases in other circuits are all over the lot .... Some insist that there be express language ...."). Given the widespread nature of the circuit conflict, and the absence of any reason to believe the conflict will resolve itself with time (as evidenced most recently by the Second Circuit's rejection of Empire's request that it reconsider this issue en banc), only review by this Court can resolve the disagreement among the lower federal courts.

### 3. The Circuits Are Also Divided Over The Issue Of Pre-Retirement Vesting

The court below also created a related circuit conflict by holding that the *Byrnes* respondents could base their vesting claim on the pre-1987 SPDs, even though those SPDs were superseded, prior to respondents' retirement, by the 1987 SPD which contained an express reservation-of-rights clause. App., *infra*, 12a-15a. The court construed the pre-1987 SPDs as potentially vesting lifetime life insurance benefits for all employees who were *eligible* for retirement at the time, even those employees (like respondents) who did not actually retire until after the revised SPD was distributed in 1987. *Id.* at 15a. The Second Circuit's conclusion that retiree welfare benefits can vest *before* an employee retires is inconsistent with the law in other courts of appeals, including the Fifth,

Sixth, and Eighth Circuits, which makes clear that a retiree's benefit entitlements are governed by the plan documents that are in effect at the time of his or her retirement.

The Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), for example, held that the plaintiffs in that case were governed by the SPD that was issued a year prior to their retirement and contained a reservation-of-rights clause, not by the SPD that had issued previously and that did not contain such language. *Id.* at 938. The court explained: "The instant plaintiffs . . . are asking us to do what neither Congress nor any other court has ever done—impose vesting for employees who had not retired." *Id.* at 936. The Sixth and Eighth Circuits agree that retiree welfare benefits can vest at retirement, but not earlier. *See Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000) (holding that collective bargaining agreements vested retirement benefits for individuals retiring before August 19, 1991, but finding that reservation-of-rights language inserted in an August 19, 1991, plan booklet was effective as to individuals retiring after that date); *Houghton v. Sipco, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994) (rejecting plaintiffs' "theory . . . that their . . . benefits vested before they retired"). Review is warranted to resolve this conflict as well.

### B. The Vesting Test Adopted By The Court Below Frustrates ERISA Policies And Leads To Harmful Results

Congress's decision to limit vesting requirements to the pension context reflects fundamental differences between the nature of pension and welfare plans. In a pension plan, either the benefit or the contribution is "defined," and thus employers can predict the costs of pension plans with near certainty over the long term. By contrast, the cost of providing employee welfare benefits (which include such benefits as health and disability insurance) is extremely unpredictable and fluctuates widely depending on developments in the

economy, the cost of medical treatments, the nature of the insurance products being made available by insurers, and a multitude of other factors. Employers simply cannot account for all of these factors ex ante when deciding what benefits to provide, and accordingly they must frequently change their welfare plan offerings in response to fluctuations in costs, insurance offerings, and the like.

As a result, "vesting" of welfare benefits all but defies practical implementation, and would pose a substantial threat to the financial well-being of countless employers. Consider, for example, how an employer today could continue to provide "vested" health insurance benefits to employees and/or retirees on the terms it was offering ten or fifteen years ago. With the massive shift to managed care that occurred over the past decade, the traditional form of indemnity insurance (which paid a stated percentage of virtually all medical costs) is simply not available in the marketplace at an affordable price, if at all. If employers could be bound to provide such welfare plan benefits on the terms offered decades ago, based on nothing more than "ambiguous" plan language drafted against the backdrop of ERISA's no-vesting rule, the consequences would be dramatic and disastrous.

Congress recognized these realities, which is precisely why it exempted welfare plans from ERISA's vesting requirements. *See* 29 U.S.C. § 1051(1). As this Court stated in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* at 78. Congress granted employers the right to modify and terminate welfare plans at their discretion in order "to keep [] costs within reasonable limits [and to avoid] placing . . . a burden on employers [that] would inhibit the establishment of such plans." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990) (internal quotation marks and citations omitted). As ERISA's legislative history

makes clear, "[t]o require the vesting of . . . ancillary benefits [such as medical and life insurance] would seriously complicate the administration and increase the cost of plans." H.R. REP. NO. 93-807, at 60 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (hereinafter "LEGISLATIVE HISTORY") at 3180 (1976). *See also* S. REP. NO. 93-383, at 51 (1973), *reprinted in* 1 LEGISLATIVE HISTORY 1119 (1976) (same).

The unduly lax "vesting" standard adopted by the court below and by the Seventh, Eighth, and Eleventh Circuits frustrates and undermines the congressional decision to reject vesting of welfare plan benefits. Given the realities and expense of modern civil litigation, the practical effect of the decisions below is to create a presumption that welfare benefits vest absent express language to the contrary—a presumption that countless ERISA welfare plans across the country will fail, having been drafted based on the (now apparently erroneous) assumption that there was no need to address the vesting issue expressly in view of the Congress's rejection of any vesting requirement. The effect of the rule adopted by the Second Circuit is thus in conflict with clear congressional intent regarding the administration of welfare plans. To the extent welfare benefits can be found to have vested despite the absence of any clear expression of employer intent to that effect in plan documents, employers run the very real risk that they will be saddled with unintended, long-term benefit obligations that they cannot afford or, in some instances, that can no longer even be satisfied with insurance products available in today's market.

Moreover, to the extent that clear and ambiguous vesting language is not required, courts will inevitably be looking outside the applicable plan documents for "extrinsic evidence" of intent. In this case, the Second Circuit expressly encouraged this result, holding that "the ultimate determination of whether Empire promised lifetime benefits should be

left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language." App., *infra*, 15a. *See also id.* at 36a ("we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions"). This result is directly contrary to ERISA's policy of "plac[ing] great weight on the written terms of . . . formal plan documents," and undermines the "predictability as to an employer's future obligations" that Congress intended to provide when it included in ERISA a requirement that employee benefit plans be established and maintained pursuant to written documents filed with the Secretary of Labor. *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994) (internal quotation marks and citation omitted). *See also* 29 U.S.C. §§ 1024(a)(1), 1102(a)(1). In addition, companies often find it difficult to locate witnesses who can testify accurately regarding the employer's intent in drafting the plan documents years earlier, making it difficult for employers to prevail in contests that turn on the introduction of extrinsic evidence.

The effect of the existing conflict over the standard for contractual vesting is to hinge the substantial stakes of these cases on nothing other than the plaintiff's choice of judicial forum. Such inconsistent results are particularly troublesome given the frequent and recurring nature of this issue and the serious financial implications for all involved. The intolerable uncertainty and inconsistency in results engendered by this continuing circuit conflict demand this Court's review.

## II. The Second Circuit's Erroneous Interpretation Of ERISA's Fiduciary Duty Provisions Conflicts With Numerous Decisions Of Other Courts of Appeals And Warrants Further Review

### A. The Second Circuit's Decision To Permit Respondents To Proceed Under Both § 502(a)(3) And § 502(a)(1)(B) Is Irreconcilable With The Decisions Of Every Other Court Of Appeals To Consider The Question

The court below held that respondents could proceed with both their fiduciary duty claim under ERISA § 502(a)(3) *and* their denial of benefits claim under ERISA § 502(a)(1)(B). App., *infra*, 22a-23a, 44a-45a. Every other court of appeals to speak to this issue has held that ERISA does not permit a § 502(a)(3) breach of fiduciary duty claim to be brought if ERISA elsewhere provides a cause of action to seek redress for the same alleged injury.

In *Varity Corp. v. Howe*, 516 U.S. 489 (1996), this Court addressed the question whether "ERISA § 502(a)(3) authorize[s] ERISA plan beneficiaries to bring a lawsuit . . . that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations," and held that the words of § 502(a)(3)—which authorize "'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title'—are broad enough to cover individual relief for breach of a fiduciary obligation." *Id.* at 492, 510. This Court read § 502(a)(3) as a "'catch[-]all' provision[] [meant to] act as a safety net, offering appropriate equitable relief for injuries caused by violations that *§ 502 does not elsewhere adequately remedy.*" *Id.* at 512 (emphasis added).

Because § 502(a)(3) is only a "catch-all remedy," the *Varity* Court indicated that fiduciary duty claims under that provision would likely be unavailable when other avenues for seeking relief had been provided in ERISA. As the Court explained, "where Congress elsewhere provided adequate

relief for a beneficiary's injury there will likely be no need for further equitable relief." *Id.* at 515. The *Varity* plaintiffs were allowed to proceed under § 502(a)(3), however, because they had no ability to proceed under any of ERISA's other civil enforcement provisions. In particular, the plaintiffs in *Varity* "could not proceed under [§ 502(a)(1)] because they were no longer members of the . . . plan and, therefore, had no benefits due [them] under the terms of [the] plan." *Id.* (internal quotation marks and citation omitted).

In permitting respondents to proceed with their breach of fiduciary duty claims under § 502(a)(3) *and* their denial of benefits claim under § 502(a)(1)(B), the Second Circuit interpreted *Varity* as follows:

> The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty . . . . *Varity Corp.* did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available . . . .

App., *infra*, 23a. *See also Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 231 (2d Cir. 2002) ("Because under § 502(a)(3)(B) we have determined that Dunnigan may recover the interest due her by reason of the Plan's unreasonable delay, if any, in paying her benefits, it makes no difference whether she also has the same entitlement under § 502(a)(1)(B)."). The court below was concerned that "should plaintiffs' claim under ERISA § 502(a)(1)(B) . . . to enforce their rights under the plan fail, plaintiffs' breach of fiduciary duty claim [would be] their only remaining remedy." App., *infra*, 22a.

The Second Circuit's holding in this regard is in direct conflict with the decisions of other circuits. The First, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have each read *Varity* to mean that claimants *cannot* maintain a breach of

fiduciary duty claim under § 502(a)(3) when they can also pursue an alternative avenue for relief under § 502(a)(1)(B). *See LaRocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (following *Varity*, "federal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section a(1), there is an adequate remedy under the plan which bars a further remedy under Section a(3)"). And this holds true irrespective of the merits of the underlying claim for denial of benefits.

In *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604 (5th Cir. 1998), for example, the plaintiff brought suit under § 502(a)(1)(B) claiming that he was wrongfully denied certain disability and medical benefits under his employer's insurance plans, and also asserted a breach of fiduciary duty claim under § 502(a)(3) based on alleged misrepresentations made to him regarding the availability of those benefits. The Fifth Circuit affirmed the district court's judgment for Avondale on both claims. With respect to the plaintiff's breach of fiduciary duty claim, the court stated that the plaintiff's "efforts to justify assertion of breach of a fiduciary duty claim against the Plans by distinguishing such a claim from his claims for coverage and benefits claims [were] woefully unavailing." *Id.* at 610. Relying on this Court's decision in *Varity,* the Fifth Circuit held that "[b]ecause Tolson ha[d] adequate redress for disavowed claims through his right to bring suit pursuant to [§ 502(a)(1)], he ha[d] no claim for breach of fiduciary duty under [§ 502(a)(3)]." *Id.* Moreover, the court specifically rejected the argument (accepted by the Second Circuit here) that the ultimate invalidity of the § 502(a)(1) claim gave rise to a § 502(a)(3) fiduciary duty claim: "The simple fact that Tolson did not prevail on his claim under [§ 502(a)(1)] does not make his alternative claim under [§ 502(a)(3)] viable." *Id.*

Similarly, in *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999), the plaintiff as-

serted a denial of benefits claim under ERISA § 502(a)(1)(B) as well as a breach of fiduciary duty claim under § 502(a)(3). *Id.* at 1088. The district court dismissed the § 502(a)(3) claim on the grounds that the plaintiff had an adequate and similar remedy under § 502(a)(1)(B), but ultimately granted summary judgment for the defendant on the latter claim as well. *Id.* The Eleventh Circuit affirmed on all counts, explaining that at the time the order was entered dismissing the breach of fiduciary duty claims under § 502(a)(3) the plaintiff "had an adequate remedy under [§ 502(a)(1)(B)], a position which she was strenuously asserting in Count I of her complaint." *Id.* at 1089. And contrary to the Second Circuit's holding in the decisions below, the Eleventh Circuit was not persuaded by the fact that the plaintiff "did not prevail on the merits of that claim." *Id.* "[T]he availability of an adequate remedy under the law for *Varity* purposes," the court explained, "does not mean, nor does it guarantee, an adjudication in one's favor." *Id.*

Numerous other cases are to the same effect. *See, e.g., Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999) ("In *Varity* the Supreme Court observed that an ERISA plaintiff may bring a private action for breach of fiduciary duty only when no other remedy is available under [§ 502]."); *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999) ("[S]ince the Supreme Court's decision in *Varity*, we have denied plaintiffs individual relief under § 502(a)(3) where another section of ERISA already provided them with an adequate remedy."); *Conley v. Pitney Bowes*, 176 F.3d 1044, 1047 (8th Cir. 1999) ("Mr. Conley has a claim for benefits under [§ 502(a)(1)(B)] and therefore may not seek the same benefits in the form of equitable relief under [§ 502(a)(3)(B)]."); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 616 (6th Cir. 1998) ("The Supreme Court clearly limited the applicability of [§ 502(a)(3)] to beneficiaries who may not avail themselves of [§ 502]'s other remedies. . . .").

Thus, the Second Circuit has imposed a burden on Empire that it would not have to carry in any other jurisdiction—that of defending its plan amendment against allegations of a breach of fiduciary duty under ERISA § 502(a)(3). Nor is there any reason to believe that the Second Circuit will correct its erroneous position on this issue in a future case. The full Second Circuit was made aware of the aberrant nature of the decisions below by virtue of Empire's petition for rehearing en banc, yet the court declined to rehear these cases en banc. As noted above, moreover, the Second Circuit has already reaffirmed its view of the law in another case. *See Dunnigan*, 277 F.3d at 231. This Court's review is necessary to correct the Second Circuit's erroneous and unduly broad view of the availability of the § 502(a)(3) "catch-all" remedy.

### B. The Decisions Below Conflict With Decisions Of This Court And Of Numerous Courts Of Appeals Regarding The Question Whether An Employer's Modification Of A Welfare Plan Is A Fiduciary Act

The court below held that amending a plan in a manner that interferes with vested benefits can constitute a fiduciary action, and that any employer that takes such an action can be held liable under ERISA's fiduciary duty provisions. App., *infra*, 19a-20a. That holding conflicts with decisions of this Court which categorically reject the notion that amendment, modification, or termination of an ERISA welfare plan constitutes a fiduciary act. Moreover, the court of appeals' proffered explanation for its holding—namely, that the plan amendment at issue in this case is allegedly invalid under ERISA as an attempt to eliminate "vested" benefits—is irreconcilable with decisions of other courts of appeals which make clear that an employer *never* acts in a fiduciary capacity when it changes plan benefits—irrespective of the ultimate validity of the change under ERISA.

This Court has squarely held that employers "who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *accord Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("'[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan'") (citation omitted). The *Spink* Court reasoned that when employers undertake to adopt, modify, or terminate welfare plans "they do not act as fiduciaries, but are analogous to the settlors of a trust." *Spink*, 517 U.S. at 890 (citations omitted). As the Court explained, "[t]his rule is rooted in the text of ERISA's definition of fiduciary," because the "'defined functions [of a fiduciary] do not include plan design,'" and thus "'an employer may decide to amend an employee benefit plan without being subject to fiduciary review.'" *Id.* (citation omitted).

Despite the clear and categorical nature of this Court's holding in *Spink*, the court below held that Empire's decision to amend the plan could be deemed a fiduciary act. App., *infra*, 19a-20a. The court conceded that "an employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary," *id.* at 20a (alteration, internal quotation marks and citation omitted), but announced a purported exception to that rule for amendments that impair vested benefits: "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. It therefore follows that Empire may have exercised discretionary authority with respect to the plan, and Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn, ERISA § 404(a)(1)(D) [which imposes obligations on fiduciaries]." *Id.* at 20a.

The Fifth Circuit has also indicated its agreement with this approach. In *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994), the court stated:

> [A]n employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, *provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan.*

*Id.* at 1524 (emphasis eliminated and added). *Accord Hines v. Massachusetts Mut. Life Ins. Co.*, 43 F.3d 207, 210 (5th Cir. 1995).

By contrast, the Third, Sixth, and Seventh Circuits have taken the opposite approach, rejecting any attempts to extend ERISA's fiduciary duty rules to allegedly improper plan amendments *even when the challenged changes interfere with vested benefits* or are otherwise invalid or in violation of the terms of applicable plan documents. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), for example, the Third Circuit explained that an employer does not act in its fiduciary capacity simply by virtue of making an invalid plan amendment:

> If a purported amendment turns out to be invalid, then plaintiffs seeking anticipatory relief can have it declared void, and plaintiffs suing for benefits must have their claims evaluated under the terms of the relevant unamended plan. . . . [But] [i]n deciding to amend the plan [the employer] did not—indeed could not—have breached any fiduciary duties, because he simply was not acting as an ERISA fiduciary.

*Id.* at 1162. *See also, e.g., Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1002 (7th Cir. 1993) (rejecting argument that selecting a method of determining withdrawal liability was a fiduciary function by virtue of the fact that it impacted vested benefits).

Similarly, in *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994), the court held that the pension benefits at issue in that case were vested, and accordingly rejected the employer's attempt to apply a plan amendment that would reduce those benefits. *Id.* at 1378. Even in that context, however, the court made clear that the employer "was not acting as a fiduciary" in amending the plan. *Id.* at 1377. That conclusion, like the Third and Seventh Circuit decisions cited above, is irreconcilable with the reasoning of the court of appeals in this case.

The decisions below are not only inconsistent with precedents of this Court and the courts of appeals, but also with ERISA's functional definition of "fiduciary." As the Third Circuit has explained, "[f]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions." *Hozier*, 908 F.2d at 1158. So, for example, an employer that is also a plan administrator is not necessarily acting in its fiduciary or administrator capacity at all times; when it acts in its capacity as employer, *i.e.*, when it performs functions other than those set forth in the Act's definition of "fiduciary," ERISA's fiduciary duty rules do not apply. *See, e.g., id.* ("[W]hen employers themselves serve as plan administrators, they assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.") (internal quotations omitted); *Spink*, 517 U.S. at 890.

The court below wholly disregarded ERISA's functional approach to fiduciary status, holding instead that the question whether the act of plan amendment constitutes a fiduciary act *depends on the permissibility of the amendment*. The language of ERISA simply does not permit this result, because the definition of fiduciary hinges on the function being performed, not the legality of the conduct at issue. *See* 29 U.S.C. § 1002(21)(A).

Moreover, the Second Circuit's approach is unworkable, because it precludes employers from knowing in advance whether a particular proposed plan amendment will be deemed a non-fiduciary act or will instead be judged against fiduciary standards (with the concomitant threat of liability for breach of fiduciary duty). As a consequence, employers are placed in an impossible Catch-22 situation, with no means of determining whether they must comply with fiduciary standards in making any particular plan amendment. Under the rule adopted below, that determination can be made only in hindsight, after years of litigating the validity of the amendment. The consequence of this uncertainty will inevitably be to discourage plan amendments and thus, "in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990).

### C. The Judgments Below Conflict With Decisions From Other Circuits Holding That ERISA Does Not Obligate Fiduciaries To Disclose The Non-Vested Nature Of Benefits In Plan Communications

In vacating the judgments for Empire on respondents' breach of fiduciary duty claims, the Second Circuit held that Empire may have violated its fiduciary duties "in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time." App., *infra*, 21a, 45a. The decisions below thus stand for the proposition that an ERISA plan fiduciary's failure to disclose the fact that welfare plan benefits are not vested can itself constitute a breach of fiduciary duty. That view of the law is directly contrary to the law in several other circuits.

In *Jensen v. Sipco, Inc.*, 38 F.3d 945 (8th Cir. 1994), for example, the Eighth Circuit expressly rejected the claim that an ERISA welfare plan administrator breached its fiduciary

duty by failing to disclose that welfare plan benefits are subject to change. The court held "that the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties." *Id.* at 952.

Similarly, in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc), the Sixth Circuit rejected a fiduciary duty claim where "GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Id.* at 405. The court explained that "[t]here is, in our view, a world of difference between . . . deliberate[ly] misleading . . . employees . . . and GM's failure to begin every communication to plan participants with a caveat." *Id.*

Several other courts of appeals have likewise rejected the possibility of fiduciary liability in these circumstances. *See UAW v. Skinner Engine Co.*, 188 F.3d 130, 151 (3d Cir. 1999) ("[T]he appellants have failed to persuade that Skinner was obligated under ERISA to inform its employees that retiree benefits may at some point in the future be modified or changed."); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 858 (4th Cir. 1994) (rejecting argument that employer was estopped under ERISA from amending benefits because it had not previously "warn[ed] plan participants of any possibility of decrease in their benefits by including a specific modification clause in the SPD"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993) (rejecting claim that failing to include amendment/termination language in SPD prevented employer from amending benefits previously offered).

In addition to this conflict with decisions of several other circuits, the Second Circuit's holding also violates the text and structure of ERISA. Although Congress expressly mandated that vesting information be provided in *pension* plan

SPDs, it did *not* mandate the inclusion of such information in welfare plan SPDs. *See* 29 U.S.C. § 1022(b) (requiring such information only "for nonforfeitable pension benefits"). By imposing potential fiduciary liability on employer/administrators for failing to include disclaimers in their plan communications, the Second Circuit is in effect requiring employers to do what Congress chose not to require of them—include express language about vesting in their welfare plan documents. As the Sixth Circuit has noted, "[i]t would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed." *Sprague*, 133 F.3d at 405.

The Second Circuit's rule creates substantial uncertainty in this heretofore well-settled area of the law, by making it impossible for employers to understand the scope of their disclosure obligations in the welfare plan context. Because nothing in ERISA itself imposes any such disclosure obligation, employers have had no reason to comply with it, and accordingly the decision below opens the door to a vast new array of fiduciary breach lawsuits predicated upon similar failures to disclose the fact that welfare benefits do not vest. This Court's review is necessary to avoid subjecting countless employers to liability for conduct that is plainly consistent with any plausible reading of ERISA, and to eliminate the conflict and confusion created by the decisions below.

## CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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May 21, 2002

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 20, 2001) (Decided: December 06, 2001)

Docket No. 00-9469

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FRANCIS J. DEVLIN,
*Plaintiff,*

RICHARD G. KUNKEL, JOSEPH G. MURPHY, DANIEL ROSENBERG, DANIEL G. SANDERS, JAMES C. SNYDER, ANTHONY J. TRUHON, JOHN WANDZILAK, JR., JOHN F. BYRNES, WILLIAM A. DE MAURO, MICHAEL ELKINS, JERROLD I. EHRLICH, BEVERLY GLICKERMAN, GERALD HARRISON, JOHN F. LUCZUN, JOHN F. MULDOON, HARRY E. NICHOLSEN, RONALD D. ZAMMIT, STERLING E. CATHEY, LOUIS L. LEVINE, ELLEN H. PROPP, JOHN L. SHURTLEFF, JULES K. LAMBEK, and EUGENE F. HARRISON
*Plaintiffs-Appellants,*

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Defendant-Appellee.*

---

BEFORE: JACOBS, F.I. PARKER, and SOTOMAYOR, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) entered on October 20, 2000, granting appel-

lee's motion for summary judgment and denying appellants' motion for summary judgment in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, challenging Empire Blue Cross and Blue Shield's decision to reduce life insurance benefits for its former employees who retired after 1989.

VACATED AND REMANDED.

MEREDITH H. SAVITT, Hite & Savitt, Albany, New York, *for Appellants*.

GARY H. GLASER, Seyfarth Shaw, New York, New York (Craig P. Pacernik, on the brief), *for Appellee*.

F.I. PARKER, *Circuit Judge*:

In 1998, defendant-appellee Empire Blue Cross and Blue Shield ("Empire") significantly lowered the amount of life insurance provided to retirees.[1] Plaintiffs-appellants are former employees of Empire who retired between 1989 and 1993. Plaintiffs seek to enforce the terms of the life insurance plan provided by Empire to its retirees, as those terms existed during their employment with Empire. In addition to their claim for injunctive and declaratory relief under §§ 502(a)(1) & (3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1) & (3), plaintiffs assert claims for monetary relief under ERISA for wrongful reduction of benefits, for breach of fiduciary duty, and for failure to provide information summaries in a

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[1] This action has spurred at least two lawsuits in the federal courts of this Circuit: the instant case and another case, *Abbruscato v. Empire Blue Cross*, ___ F.3d ___ (2d Cir. 2001), which is also being decided today. These cases were heard in tandem by this Court. We issue two separate opinions in these cases because each set of plaintiffs asserts different arguments on appeal.

timely fashion. Plaintiffs also assert a claim based on promissory estoppel.

The district court (Barbara S. Jones, Judge) rejected plaintiffs' claims for relief, principally concluding that the relevant ERISA plan documents did not provide plaintiffs with a vested life insurance benefit at the previous level of coverage. *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV. 8520(BSJ), 2000 WL 1538605, at *4-*9 (S.D.N.Y. Oct. 18, 2000). On appeal, plaintiffs contend that the relevant plan documents provide them with a vested life insurance benefit in an amount equivalent to their final annual salary. Additionally, plaintiffs contend that they are entitled to recover benefits under a theory of promissory estoppel. Finally, plaintiffs assert a breach of fiduciary duty claim under ERISA § 404(a), 29 U.S.C. § 1104(a).

For the reasons set forth below, we agree with plaintiffs that the relevant plan documents can reasonably be interpreted to provide a vested life insurance benefit. We also agree that summary judgment was inappropriately granted to defendant on the promissory estoppel, breach of fiduciary duty, and penalty claims. We therefore vacate the district court's decision granting summary judgment to Empire and remand to the district court for further proceedings consistent with this opinion.

## I. BACKGROUND

Plaintiffs were all employed by Empire for various lengths of time, with some plaintiffs having worked at Empire for over 40 years. All retired from Empire between 1989 and 1993. Some of these plaintiffs retired pursuant to an early retirement incentive program announced in 1992, known as the Voluntary Separation Opportunity Program ("VSOP"). Others retired pursuant to a similar program offered in 1993, known as the Voluntary Incentive Program ("VIP"). The remaining plaintiffs retired pursuant to Empire's normal retirement program.

Throughout plaintiffs' employment, Empire provided life insurance benefits at no cost to its employees and retirees. These benefits were described by Empire in a summary plan description ("SPD") distributed to employees prior to 1987:

> All graded employees, hired on a full-time basis, after a probationary period become a member of our Group Life Insurance Plan, while all full-time Executive Compensation Program are covered upon employment.
>
> In addition, retired employees, after completion of twenty years of full-time permanent service and at least age 55 will be insured.
>
> . . .
>
> Your life insurance is twice your annual salary, excluding overtime pay.
>
> . . .
>
> For eligible retirees, the group life insurance will be reduced 10% on the retirement date and in equal amounts on the next four anniversaries of the retirement date. That is, on the fourth anniversary of the employee's retirement, benefits will have been reduce [sic] 50% of the pre-retirement level *for the remainder of their lives* [sic].

J.A. at 522 (emphasis added).[2] This SPD contained no qualification or condition on these benefits, nor did it contain any

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[2] Another document apparently distributed after the quoted document, but also prior to 1987, contained virtually identical language describing the group life insurance benefits. J.A. at 527. The main difference between these two descriptions is that the later document provides that the

[Footnote continued on next page]

indication that Empire would or could later reduce or eliminate them.

In 1987, Empire created and distributed an employee handbook, entitled "Your Handbook," which also included a summary plan description of Empire's group life insurance benefits. Like the earlier plans, this plan provided no-cost life insurance benefits to employees at an amount equal to two times the employee's annual salary. For retirees, the plan Provided that:

> If you retire . . . at age 65 or older with 10 or more years of full-time service; *or* at age 55 or older with 20 or more years of full-time service; *or* at any age, with 30 or more years of full-time service, your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage *remains in force for the rest of your life, at no cost to you.*

J.A. at 73. The last sentence on the last page of this document informs employees that "[o]ther important information about [their] Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.'" J.A. at 79. Contained in the 'Benefit Administration' section is the following statement:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits [sic] of its employees. The company expects and intends

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[Footnote continued from previous page]
10% benefit reduction begins at age 65, whether the employee is an active employee or a retiree. *Id.*

> to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time.

J.A. at 83. This reservation of rights appears for the first time in 1987 in "Your Handbook." As noted, the earlier plan descriptions contain no similar language.

In 1992, Empire implemented the VSOP, a voluntary workforce reduction program. In connection with this program, Empire distributed materials outlining eligibility and program benefits. Participation in this program required eligible employees to "voluntarily resign from Empire in exchange for certain benefits." J.A. at 536. These "certain benefits" included life insurance coverage, on substantially the same terms as provided in the earlier plans. While the VSOP's description of health insurance benefits included an explicit reservation of Empire's right to adjust coverage, the description of life insurance benefits did not. In the "Administration" section of these materials, however, Empire "reserve[d] the right to amend and/or terminate the VSO Program at any time for any purpose." J.A. at 540. This section also warned that "Empire may or may not adopt new or modified programs or benefits or take other actions in the future that, depending on your individual circumstances, may be more or less advantageous to you than the current Program." *Id.*

In 1993, Empire offered the VIP, another early retirement incentive program similar to the VSOP. A document distributed in connection with this program informed employees that "[y]our insurance benefits may be extended to you for your lifetime. . ., depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify *or* if you would qualify *by adding five years to your age and five years to your service under the*

*VIP*." J.A. at 559. The VIP provided for life insurance benefits virtually identical to those described in earlier plans; that is, benefits were reduced by 10% on retirement and for four subsequent years, until reaching one's annual salary. Like the VSOP materials, the VIP's healthcare insurance description contained a reservation of rights, but the description of life insurance benefits did not. The VIP's Administration section included the following language:

> Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, up to the date on which that employee's Resignation and General Release and Covenant Not to Sue becomes effective. Empire also reserves the right to announce new and different plans and programs as business needs require.

J.A. at 562.

In late 1997, because of financial difficulties and in an effort to "remake itself as a corporation in the managed care environment and remain economically competitive," Empire reviewed its benefits plans. On June 24, 1998, Empire announced that the "Board of Directors voted to adopt a number of new benefit provisions for current employees [and] retirees" effective January 1, 1999. J.A. at 572. These new benefits provisions affected individuals who retired from Empire after January 1, 1989 and before June 23, 1998. Among the changes instituted by Empire was a reduction in life insurance coverage to a flat $7,500.

Many retirees wrote to Empire, demanding an explanation for this reduction in benefits and to obtain more information about Empire's decision-making process. In response, Empire informed these retirees that the reduction was necessary for Empire's financial health and that Empire had clearly "reserve[d] the right to modify or reduce benefits in its sole discretion[.]" J.A. at 626.

In late 1998 and early 1999, two groups of retirees filed suit in the Southern District of New York, asserting several ERISA claims as well as a claim of promissory estoppel. In June 1999, these cases were consolidated for all purposes. Essentially, these retirees claimed that the employee handbooks distributed prior to 1987 contain promises of lifetime life insurance benefits in an amount equal to their annual salary.

Upon cross-motions for summary judgment, the district court rejected plaintiffs' claim for benefits. First, the district court concluded that the relevant plan documents were either the 1987 "Your Handbook," the VSOP documents, or the VIP documents, depending on each plaintiffs' retirement program. *Byrnes*, 2000 WL 1538605, at *7. According to the district court, because each of these documents contained "unambiguous reservation of rights clause[s] . . . plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500." *Id.* at *8. The district court similarly rejected plaintiffs' breach of fiduciary duty and penalty claims under ERISA, concluding that Empire had acted in accordance with and had properly provided its employees with the relevant plan documents. *Id.* at *9-*10. The district court also granted summary judgment to Empire on plaintiffs' promissory estoppel claim, holding that plaintiffs had failed to "allege[] the extraordinary circumstances necessary to state a claim of promissory estoppel under ERISA." *Id.* at *10. Judgment was entered for the defendant, and this appeal followed.

## II. DISCUSSION

Plaintiffs contend on appeal that the pre-1987 SPDs contained a promise of lifetime life insurance benefits at the annual salary level and that these benefits vested in the plaintiffs when they qualified for retirement by attaining age fifty-five and completing at least twenty years of service. Additionally, plaintiffs contend that the doctrine of promissory

estoppel bars Empire from unilaterally reducing the life insurance benefits. Finally, plaintiffs assert that Empire breached its fiduciary duty by providing them with false and misleading plan information.

We review the grant of a summary judgment motion de novo, and "reversal is required if there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996) (citations and internal quotation marks omitted)

**A. Contractual Vesting**

Plaintiffs claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which permits a civil action by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Essentially, plaintiffs assert under this section a "contractual right under a benefit plan." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999)

"ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *see also Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (stating the general rule that under ERISA an employer welfare plan is not vested and that an employer has the right to terminate or unilaterally amend the plan at any time).[3] "[I]f a

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[3] The parties do not dispute that life insurance benefits are such "welfare benefits" under ERISA. *See* 29 U.S.C. § 1002(1)

[plan] document unambiguously indicates whether retiree. benefits are vested, the unambiguous language should be enforced." *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("*Multifoods*"). Thus, even though Empire is "generally free" to modify its life insurance plan, if Empire promised vested benefits, those benefits will be enforced.

To ascertain if Empire made such a promise, we must examine the relevant ERISA plan documents. Plaintiffs urge us to review the pre-1987 SPDs distributed by Empire, which Empire concedes contained no reservation of rights to modify the benefits and which, plaintiffs argue, evince Empire's intent to vest lifetime life insurance benefits upon their eligibility for retirement. Both pre-1987 SPDs include language indicating that life insurance coverage after retirement would remain at a level equivalent to plaintiffs' annual salaries "for the remainder of their lives."

The district court concluded that this language did "not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired." *Byrnes*, 2001 WL 1538605, at *5. Without such "clear and express" language, the district court reasoned, the only reasonable interpretation of the pre-1987 SPDs was that life insurance benefits would be vested only if plaintiffs retired prior to 1987, when Empire issued "Your Handbook" which included an express reservation of rights clause. *Id.*

In reaching its conclusion, the district court relied on *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). We understand the district court's temptation to rely on the Fifth Circuit's decision in *Wise* as it presents facts similar to those presented here. In *Wise*, the defendant-employer issued SPDs that described healthcare benefits for retirees but failed to include any express reservation of the right to amend or terminate the Plan's benefit provisions. *Id.* at 932. When the defendant realized this failure, it issued

new SPDs which "la[id] the groundwork for future changes" by including a reservation clause. *Id.* at 933. Shortly after issuing these new SPDs, the defendant announced the termination of healthcare benefits for those retiring after a certain cut-off date. *Id.* The Fifth Circuit affirmed the grant of summary judgment to the employer, reasoning that it had not contractually vested its employees with free lifetime healthcare coverage because "[s]uch extra-ERISA commitments must be found in the plan documents and must be stated in *clear and express language*." *Id.* at 937 (emphasis added). *Wise* explained further:

> Aside from the fact that the underlying documents and the later SPDs *did* place employees on firm notice of the coming change, we find no reason or authority to conclude that pre-1985 silence in the SPDs is somehow tantamount to an affirmative contractual commitment and that El Paso's earlier SPDS impliedly cede the right to later amend or discontinue coverage. While clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence. There is nothing in the way of context, inference, or presumption to persuade us otherwise. Contractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation.

*Id.* at 938.

Notwithstanding these similarities, the district court erred in relying on the standard for contractual vesting set forth in *Wise*. *Wise* requires a plaintiff opposing summary judgment to show a promise that is "clear and express" and to show "precise language denying the right to withdraw benefits." *Id.* at 937-38. We take a different view:

> In this Circuit, to reach a trier of fact, an employee does not have to "point to unambiguous language to support [a] claim. It is enough [to] point to written language *capable of reasonably being interpreted* as creating a promise on the part of [the employer] to vest [the recipient's] . . . benefits."

*Multifoods*, 116 F.3d at 980 (quoting *Schonholz*, 87 F.3d at 78). Our standard permits a plaintiff to get to a trier of fact based on ambiguous plan language, while the *Wise* standard requires clear and unambiguous language.

We have rejected *Wise* twice before. In *Schonholz*, we concluded that the plaintiff was *not* required to "point to unambiguous language to support her claim" and criticized the district court for holding that an employer's commitment to vest benefits "must be in 'precise language denying the right to withdraw benefits.'" *Schonholz*, 87 F.3d at 78 (quoting *Schonholz v. Long Island Jewish Med. Ctr.*, 889 F. Supp. 610, 615 (E.D.N.Y. 1995), which in turn quoted *Wise*, 986 F.2d at 938)). In *Multifoods*, we described a circuit split as to the summary judgment rules for contractual vesting, noting that *Wise* was among those requiring "clear and express language." *Multifoods*, 116 F.3d at 980. After noting the circuit split, we emphasized that, in this Circuit, a plaintiff need only "'point to written language *capable of reasonably being interpreted* as creating a promise'" to survive an employer's summary judgment motion. *Id.* (quoting *Schonholz*, 87 F.3d at 78)

Under our standard, then, the plaintiffs here must first identify "specific written language that is reasonably susceptible to interpretation as a promise." *Joyce*, 171 F.3d at 134. Plaintiffs direct our attention to two sentences within the pre-1987 SPDs. The first provides that "retired employees, after completion of twenty years of full-time permanent service and at least age 55 *will be insured*." J.A. at 522 (emphasis

added). We believe that this statement can be reasonably read as promising such insurance so long as employees retire after age 55 and have provided full-time permanent service to Empire for at least twenty years. This provision can be construed as an offer that specifies performance as the means of acceptance -- sometimes referred to as an offer for a unilateral contract -- and promises lifetime life insurance benefits upon performance.[4] Therefore, by "performing" (that is, working for at least twenty years until attaining the age of 55), the plaintiffs accepted this offer. *Restatement (Second) of Contracts* §45(1) (1981). Where the offeror did not explicitly reserve the power to revoke, such an offer cannot be revoked once the offeree has begun to perform. *See id.* § 45 & cmt. d ("The beginning of performance . . . completes the manifestation of mutual assent and furnishes considera-

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[4] We note that our decision in *Reiphelt v. Emhart Corp.* states that "ERISA preempts civil actions against employers for [welfare benefits] predicated on common-law contract principles." *Reichelt*, 921 F.2d 425, 431-32 (2d Cir. 1990). In *Reichelt*, we rejected the plaintiff's contention that the employer's severance plan created a "unilateral offer that employees accept by continuing to work for the employer" because "accepting plaintiffs' argument would nullify Congress's determination in structuring ERISA that welfare benefit plans . . . should be exempted from the stringent vesting requirements applicable to pension benefit plans." *Id.* at 432.

Here, plaintiffs do not rely on a common law contract claim to the exclusion of a claim under ERISA; instead, plaintiffs' claim under ERISA § 502(a)(1)(B), which is essentially "the assertion of a contractual right under a benefit plan." *Strom*, 202 F.3d at 142. As we recently held in *Multifoods*, "if an employer promises vested benefits, that promise will be enforced." *Multifoods*, 116 F.3d at 980 (citing 29 U.S.C. § 1132(a)(1)(B)); *see also Schonholz*, 87 F.3d at 78-79 (applying the common law of contracts in assessing a promissory estoppel claim under ERISA). Contract law therefore guides our determination of whether, under ERISA, plaintiffs are entitled to "enforce [their] rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

tion.").[5] Therefore, Empire's reliance on its 1987 SPD, "Your Handbook," for its reservation of the right to modify the life insurance benefits is unavailing. We reject Empire's argument because after the plaintiffs began performance, pursuant to the pre-1987 SPDs, Empire was not free to revoke.[6]

The second statement contained in the pre-1987 SPDs which plaintiffs invoke provides that life insurance benefits "will remain at [the annual salary level] *for the remainder of their* lives." J.A. at 527 (emphasis added). Such "lifetime" language, we believe, is sufficient to create a triable issue of fact as to whether Empire promised to vest retiree life insurance benefits at the stated level. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 605-08 (7th Cir. 1993) (en banc) (Posner, J.) (allowing case to go to jury based on written language stating that "both you and your spouse will be covered for the remainder of your lives"); *cf. Joyce*, 171 F.3d at 135 (reject-

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[5] New York law apparently follows the minority view that a unilateral contract offer is revocable up until performance is *complete*. *See Petterson v. Pattberg*, 161 N.E. 431 (N.Y. 1928). Empire's argument parallels this view: Because these employees retired after 1987, when the SPD containing the reservation of rights clause issued, they are not entitled to the disputed life insurance benefits.

However, in ERISA cases, state law does not control. Instead, general common law principles apply. In *Schonholz*, for example, we reversed where the district court relied on New York's formulation of promissory estoppel. *Schonholz*, 87 F.3d at 78-79 (relying on *Restatement (Second) of Contracts* § 90(1) for the elements of promissory estoppel and noting that "ERISA is a federal law regime . . . designed to eliminate the threat of conflicting state and local regulation")

[6] It is for this reason that Empire's reliance upon the VSOP or VIP documents' reservation of rights clauses likewise fails (assuming that these clauses in fact successfully reserved Empire's right to amend these plans).

ing contractual vesting argument where document did not include "language that affirmatively operates to create the promise of vesting" but noting that a promise of benefits for one's lifetime gives rise to a triable fact issue, citing *Bidlack*, 993 F.2d at 605-08); *Multifoods*, 116 F.3d at 982 (finding that no vesting where "statements simply indicate *who* would pay the costs of the plan" but "in no way indicate that Multifoods would *continue* to pay the cost of the plan for the retirees' lifetime.")

Applying the proper standard to these two statements contained in the pre-1987 SPDs, we conclude that they are indeed "capable of reasonably being interpreted" as creating a promise to vest lifetime life insurance benefits in those employees eligible for retirement. Because of the ambiguity of the language, the ultimate determination of whether Empire promised lifetime benefits should be left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language. *See Bidlack*, 993 F.2d at 609 (allowing parties to present extrinsic evidence to "disambiguate" a collective bargaining agreement's health benefits provisions).[7]

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[7] In this vein, plaintiffs have presented exit letters given to retiring employees which describe the retirees' life insurance benefits as a lifetime benefit: "The company provided life insurance that you have under our group program . . . will also be continued . . . . This amount will be reduced by 10% on your retirement date . . . and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement . . . until it reaches [a level equal to your annual salary] where it *will remain constant for life.*" J.A. at 611 (emphasis added). The letters included no indication that this coverage would be reduced or terminated. Such evidence arguably reinforces plaintiffs' interpretation of the relevant plan documents.

**B. Promissory Estoppel**

"[P]rinciples of estoppel can apply in ERISA cases under extraordinary circumstances." *Schonholz*, 87 F.3d at 78. A plaintiff must satisfy four elements to succeed on a claim of promissory estoppel: "' (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.'" *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999) (quoting *Schonholz*, 87 F.3d at 79). Additionally, "an ERISA plaintiff must 'adduce[] not only facts sufficient to support the four basic elements of promissory estoppel, but facts sufficient to [satisfy an] 'extraordinary circumstances' requirement as well.'" *Aramony*, 191 F.3d at 151 (quoting *Devlin v. Transp. Comms. Int'l Union*, 173 F.3d 94, 102 (2d Cir. 1999)). *Schonholz* provides an example of such extraordinary circumstances, where the employer used promised severance benefits to induce the plaintiff to retire. *Schonholz*, 87 F.3d at 79-80.

Plaintiffs argue that the district court erred by holding that "[t]o satisfy the extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part." *Byrnes*, 2000 WL 1538605, at *10. In *Schonholz*, we stated that "we . . . require, for purposes of ERISA, . . . that [plaintiff] demonstrate a promise that [defendant] reasonably should have expected to induce action or forbearance on her part." *Schonholz*, 87 F.3d at 79. We did not, however, explicitly define "extraordinary circumstances" or limit it to circumstances of inducement. In *Devlin*, we noted that "the remarkable consideration in *Schonholz* was the defendants' use of promised severance benefits as an inducement to persuade Schonholz to retire" and concluded that such circumstances were absent in that case, because the plaintiffs in *Devlin* could not demonstrate such inducement. *Devlin*, 173 F.3d at 102. Because

we conclude that plaintiffs here have demonstrated sufficient facts supporting intentional inducement to avoid summary judgment, we need not decide whether extraordinary circumstances other than intentional inducement would suffice.

To succeed on this claim, then, plaintiffs must, in addition to the four basic elements of promissory estoppel, point to circumstances "beyond the ordinary." *Aramony*, 191 F.3d at 152. In this vein, plaintiffs contend that the injustice suffered by them due to Empire's reduction in life insurance benefits is such an extraordinary circumstance. But "injustice" is one of the four basic elements of the claim, and therefore does not rise to the level of "extraordinary." *Devlin*, 173 F.3d at 102 ("[R]eliance is one of the four basic elements of promissory estoppel, and would not by itself render this case 'extraordinary.'").

Plaintiffs also contend that they were induced by Empire to work for over twenty and up to forty years in order to receive (inter alia) a particular level of life insurance coverage, and that Empire acted with the intent to induce by "distributing literature guaranteeing 'lifetime' benefits at 'no cost.'" Appellants' Br. at 29. The district court rejected this contention and noted if courts "were to consider it extraordinary every time an employee chose a job based in part on the quality of an employer's benefits package, the requirement of 'extraordinary circumstances' would lose all meaning." *Byrnes*, 2000 WL 1538605, at *10.

Contrary to the district court's conclusion, we believe that plaintiffs have demonstrated more than mere *acceptance* of employment at Empire in exchange for these benefits; instead, they have dedicated much of their working lives to Empire. Edwin R. Werner, Empire's former chief executive officer, stated in his deposition that Empire "probably would never be able to compete with some of the profit-making companies out in the world who were competing for the same employees . . . [I]n order to compensate . . . for the fact that

[Empire] might not be able to compete with some organizations that would like the same employees that we would like, we needed to treat our employees well. Our fringe benefit program needed to be respectable. . . ." J.A. at 771. From these and similar statements describing Empire's "promise" of lifetime life insurance benefits for retirees, a trier of fact could reasonably conclude that Empire intentionally promised lifetime life insurance benefits to lure (and retain) employees away from other firms paying higher salaries and then denied those benefits after the employees were of an age where they could neither make up the salary difference or obtain alternative benefits at a reasonable cost. If so found, we believe that such a practice constitutes "extraordinary circumstances" sufficient to support plaintiffs' promissory estoppel claim. Because we find that there are genuine issues of material facts with respect to plaintiffs' promissory estoppel claim, we vacate the grant of summary judgment to the defendants on that claim.

### C. Breach of Fiduciary Duty under ERISA

Plaintiffs contend that Empire breached its fiduciary duties, as outlined in ERISA §§ 404(a)(1)(A), (B), and (D) providing that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-. . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a). Plaintiffs' breach of fiduciary duty claims under ERISA §§ 404(a)(1)(A) & (B) are based on Empire's communications concerning their life insurance benefits. Specifically, plaintiffs focus on the retirement letters which indicated that life insurance coverage would be provided for life and on Empire's furnishing the 1987 SPD in response to inquiries concerning the benefit reduction. Plaintiffs' breach of fiduciary duty claim under ERISA § 404(a)(1)(D) alleges that Empire, in reducing their life insurance coverage to $7500, failed to act in accordance with the life insurance plan documents. The district court rejected all of plaintiffs' fiduciary duty claims, concluding that "Empire acted in accordance with the documents . . . in reducing plaintiffs' life insurance benefit" and "did not describe its benefits to the plaintiffs in a way that was misleading or dishonest; rather it described the plan accurately by setting forth what it intended to continue to offer to retirees while expressly reserving the right to amend or terminate the benefits." *Byrnes*, 2000 WL 1538605, at *9.

Because we disagree with the district court's underlying conclusion—that Empire acted in accordance with the plan documents and that Empire "described the plan accurately while expressly reserving the right to amend"—we must remand these claims in light of our remand of plaintiffs' contractual vesting claim. We provide the district court with the following guidance to be considered on remand.

First, we reject both Empire's assertion and the district court's conclusion that Empire was not acting in a fiduciary capacity when it reduced plaintiffs' life insurance benefits. ERISA provides that a "'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp.*

*v. Howe*, 516 U.S. 489, 498 (1996) (quoting ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)). Although it is true that "[a]n employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary," *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995), Empire may not have been merely amending an existing retirement plan with respect to the life insurance benefits of these retirees. We have already concluded that, *with respect to these retirees*, Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. It therefore follows that Empire may have exercised discretionary authority with respect to the plan, and Empire's unilateral reduction in benefits and its communications about this reduction may have violated the plan documents and, in turn, ERISA § 404(a)(1)(D). With respect to the claims based on allegedly misleading communications, we likewise conclude that Empire may have been acting as a fiduciary when it communicated with its employees and retirees concerning the contents of the welfare benefits plan. *See Varity Corp.*, 516 U.S. at 502-03 (finding that where employer communicates with plan beneficiaries about the contents of the plan, an employer is acting in a fiduciary capacity for ERISA purposes where "reasonable employees . . . could have thought that [the employer] was communicating with them *both* as employer *and* as plan administrator" (emphasis added)); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001) ("Communicating information about future plan benefits is indeed a fiduciary obligation."); *see also Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998) (finding that an employer "may have acted in a fiduciary capacity when it explained its retirement program to the early retirees").

Second, regarding fiduciary duty claims under ERISA §§ 404(a)(1)(A) & (B), "[a] fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing

benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'" *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J. (quoting ERISA §§ 404(a)(1)(A) & (B)). Although "a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted," *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), a fiduciary also has "a duty to deal fairly and honestly with its beneficiaries," *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997). In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time. "[W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (concluding that Unisys had breached its fiduciary duty where it "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life—even though as the district court concluded in rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits"); *cf. Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271 (2d Cir. 1997) ("An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan."). On remand, the district court should permit a trier of fact to evaluate Empire's communications with plaintiffs for

affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire breached it.

Finally, we disagree with Empire's contention that "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." Appellee's Br. at 41. Plaintiffs' cause of action for their breach of fiduciary duty claims arises from ERISA § 502(a)(3) which allows plan participants, beneficiaries or fiduciaries to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or terms of the plan, or . . . obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). In *Varity Corp.*, the Supreme Court held that such claims alleging breach of fiduciary duty could be brought by individual plaintiffs because ERISA § 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by [ERISA] violations that § 502 does not elsewhere adequately remedy." *Varity Corp.*, 516 U.S. at 512. The Supreme Court further noted that, given ERISA's requirement that fiduciaries act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513. We note that should plaintiffs' claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to enforce their rights under the plan fail, plaintiffs' breach of fiduciary duty claim is their only remaining remedy. *Varity Corp.* clearly provides that, where a plan participant has no remedy under another section of ERISA, she can assert a claim for breach of fiduciary duty under §502(a)(3) *Id.* at 515 (noting that ERISA's purposes would be furthered by granting a remedy where no other remedy is available); *see also Strom*, 202 F.3d at 149 ("[*Varity Corp.*] evidences a clear intention to

avoid construing ERISA in a manner that would leave beneficiaries . . . without any remedy at all.").

*Varity Corp.* further explained, however, that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief *normally* would not be 'appropriate.'" *Varity Corp.*, 516 U.S. at 515 (emphasis added). The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty; instead, the Court indicated that equitable relief under § 502(a)(3) would "normally" not be appropriate. Ultimately, we believe that the determination of "appropriate equitable relief" rests with the district court should plaintiffs succeed on both claims. This determination must be based on ERISA policy and the "special nature and purpose of employee benefit plans." *Id.* (internal quotation marks omitted). We therefore hold that *Varity Corp.* did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate. If the plaintiffs ultimately prevail on this claim upon remand, the district court must then fashion appropriate relief.

**D. Penalties**

Plaintiffs also press on appeal their claim for penalties under ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), for failing to provide requested plan information as required by § 104, 29 U.S.C. § 1024. Section 502(c)(1)(B) provides that "[a]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal."

29 U.S.C. § 1132(c)(1)(B). Plaintiffs contend here, as they did below, that Empire is liable for penalties because it "provided [them] with documentation that . . . Empire knew or should have known did not apply to these individuals and did not govern their benefits." Appellants' Br. at 32. The district court rejected this claim, after determining that Empire furnished copies of the 1987 SPD in a timely fashion. *Byrnes*, 2000 WL 1538605, at *10. Because we are remanding to the district court, in part based on our determination that the *pre-1987* SPDs applied to these plaintiffs, we likewise remand plaintiffs' claim for penalties to the district court. We note, however, that Empire did provide the 1987 SPD within the 30-day time limit and that the ultimate assessment of penalties is a discretionary matter for the district court. In assessing a claim for penalties, courts have considered various factors, including "bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary." *Pagovich v. Moskowitz*, 865 F. Supp. 130, 137 (S.D.N.Y. 1994) (citing cases). On remand, the district court should evaluate this claim in light of these factors.

## III. CONCLUSION

For the foregoing reasons, we vacate the district court's grant of summary judgment to Empire and remand to allow plaintiffs to present extrinsic evidence, if any, to a trier of fact to illuminate the ambiguities present in the pre-1987 SPDs. We additionally vacate summary judgment with respect to the promissory estoppel, fiduciary duty and penalty claims and remand to the district court for further proceedings consistent with this opinion.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 20, 2001) (Decided: December 06, 2001)

Docket No. 00-9469

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CALOGERA ABBRUSCATO, SAL AUTOLINO, GENEVIEVE BANGER, MARIE BRAMSON, ERNA SEALS-BROWN, VINCENT CARLIN, VINCENT CEFOLA, ELAINE CIRINO, VINCENT CIRINO, TIMOTHY CONNORS, JUANITA R. EVELYN, JEANETTE GRAVES, THOMAS HUGHEY, ELAINE V. HUTTON, RALPH LEGGETT, JOHN 0. McGEE, MARIA MELE, JOHN MEROLLA, CYRILLA R. PALERMO, ALBERT PEDOTA, MARY A. REIDY, NEVILLE SARGEANT, GEORGE SCHIRM, SHEILA SPARLING, MARY HOFFMEISTER-TRAVERS, JOHN D. VELLA, HOWARD WALSH, ESTATE OF JOANNA W. BLACKWOOD, ROBERT NOVAS, CATHERINE BRANDOFF, BARBARA L. McCARTHY, EUSTACE GRIFFITH, LULA MAE MILLER, MARTIN VARLEY, and GWEN ZUCKER,

*Plaintiffs*,

IRMA M. ALICEA, JACK BROOK, ARTHUR ENGLISH, JOSEPH FLEMING, ANTHONY HECKEL, MARIE MORRIS, ANN MUSTO, ROSE MARIE O'CONNOR, ELAINE BAILEY-PEREIRA, JAMES PHOTIS, JOHN PIRRO, MARY PURCELL, HENRY REYNOLDS, ALBERT RICUITO, SHEILA SANSOSTI, GERARD SUSSUNGHAM, JOSEPH L. CERRONE, JR., and DAPHNE SMALL,

*Plaintiffs-Appellants*,

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Defendant-Appellee.*

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BEFORE: JACOBS, F.I. PARKER, and SOTOMAYOR, Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, Judge) entered on October 26, 2000, granting appellee's motion for summary judgment in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, challenging Empire Blue Cross and Blue Shield's decision to reduce life insurance benefits for its former employees who retired after January 1, 1989.

AFFIRMED in part, VACATED and REMANDED in part.

ALVIN GREEN and MARTIN SEHAM, Seham, Seham, Meltz & Petersen, New York, New York, *for Appellants*.

GARY H. GLASER, Seyfarth Shaw, New York, New York, *for Appellee*.

F.I. PARKER, *Circuit Judge*:

In this case brought pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*, appellants challenge defendant-appellee Empire Blue Cross and Blue Shield's ("Empire") reduction in life insurance benefits to former employees who retired after January 1, 1989. Our decision in *Kunkel v. Empire Blue Cross and Blue Shield*, No. 00-9469, F.3d (2d Cir. 2001), also issued today, concerned a similar challenge to this same reduction. In *Kunkel*, we vacated the district court's grant of

summary judgment to Empire, principally concluding that the district court had applied the wrong standard to the retirees' claim that their life insurance benefits had vested pursuant to an alleged promise by Empire, and remanded to the district court for further proceedings. We issue a separate opinion in this case because these appellants base their claims for life insurance benefits on different documents.

For the reasons set forth below, we Vacate the summary judgment and remand appellants' claims in part, and affirm the grant of summary judgment in part.

## I. BACKGROUND

The sixteen appellants are former Empire employees who retired between 1989 and 1998. Six of the retirees retired from Empire pursuant to an early incentive program offered in 1992, known as the Voluntary Separation Opportunity Program ("VSOP").[1] Two of the appellants retired from Empire pursuant to a similar program offered in 1993, known as the Voluntary Incentive Program ("VIP").[2] Some of the remaining appellants retired in the normal course, not pursuant to any early retirement incentive program. Others retired pursuant to a "Separation Agreement and General Release."

As in *Kunkel*, we set forth in some detail the language of the documents issued by Empire which describe the life insurance benefits.

In 1987, Empire created and distributed an employee handbook, entitled "Your Handbook," which included a summary plan description (the "1987 SPD") of Empire's group life insurance benefits. For retirees, this plan provided

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[1] These six appellants are Irma Alicea, Arthur English, Joseph Fleming, Anthony Heckel, Rose Marie O'Connor, and Gerard Sussungham.

[2] These two appellants are Marie Morris and Sheila Sansosti.

life insurance coverage at an amount equal to one's annual salary at retirement, provided at no cost to the retiree. Specifically, the plan stated that:

> If you retire . . . at age 65 or older with 10 or more years of full-time service; or at age 55 or older with 20 or more years of full-time service; or at any age, with 30 or more years of full-time service, your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage *remains in force for the rest of your life, at no cost to you.*

J.A. at 342 (emphasis added). The last sentence on the last page of this document informs employees that "[o]ther important information about [their] Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.'" J.A. at 348. Contained in the "Benefit Administration" section is the following statement:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits [sic] of its employees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time.

J.A. at 352 (the "reservation of rights" clause)

In 1992, Empire introduced the VSOP, a voluntary workforce reduction program. In connection with this program, Empire distributed materials outlining eligibility and program benefits. Participation in this program required eligible employees to "voluntarily resign from Empire in ex-

change for certain benefits." J.A. at 141. These "certain benefits" included life insurance coverage, on substantially the same terms as provided in Empire's earlier plans. While the VSOP's description of health insurance benefits included an explicit reservation of Empire's right to adjust coverage, the description of life insurance benefits did not. In the "Administration" section of these materials, however, Empire "reserve[d] the right to amend and/or terminate the VSO Program at any time for any purpose." J.A. at 145. This section also warned that "Empire may or may not adopt new or modified programs or benefits or take other actions in the future that, depending on your individual circumstances, may be more or less advantageous to you than the current Program." Id.

In 1993, Empire offered the VIP, another early retirement incentive program similar to the VSOP. VIP documents informed employees that "[y]our insurance benefits may be extended to you for your lifetime . . ., depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify or if you would qualify *by adding five years to your age and five years to your service under the VIP*." J.A. at 167. The VIP provided for life insurance benefits virtually identical to those described in earlier plans; that is, benefits reduced by 10% on retirement and for four subsequent years, until reaching one's annual salary. Like the VSOP materials, the VIP's healthcare insurance description contained a reservation of rights, but the description of life insurance benefits did not. The VIP's Administration section included the following language:

> Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, up to the date on which that employee's Resignation and General Release and Covenant Not to Sue be-

> comes effective. Empire also reserves the right to announce new and different plans and programs as business needs require.

J.A. at 170.

The "Separation Agreement and General Release" entered into by certain appellants provided that "Empire reserves the right to change or eliminate, at any time, these retiree medical and life insurance benefits." J.A. at 181. It further provided that "[t]his separation agreement and release constitutes the sole and complete understanding between the parties." J.A. at 182.

Three of the normal retirees[3] received a letter upon retirement which described the retirement life insurance benefits:

> The life insurance that you have under our group program . . . will also be continued. You are presently insured for [two times your annual salary at retirement]. This amount will be reduced by 10% on your retirement date, . . . and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement, until it reaches [your annual salary] where it will remain constant (subject to the disclaimer below).

J.A. at 183-84. The disclaimer stated that "Empire retains sole discretion to modify or terminate each of the benefits described above at anytime." J.A. at 184.

On June 24, 1998, Empire distributed a letter which informed retirees that "the Board of Directors voted to adopt a

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[3] These individuals are Jack Brook, James Photis, and Henry Reynolds.

number of new benefit provisions for current employees, retirees and long-term disabled, that will go into effect January 1, 1999." J.A. at 57. These new provisions were necessary, the letter explained, for Empire to "distinguish itself in the complex world of health care" and to "bring Empire into line with [its] business competitors." J.A. at 57. The letter attached a summary of benefits changes, which announced that "[l]ife insurance will be provided at a flat $7,500" for those retirees who retired between January 1, 1989 and prior to June 23, 1998. J.A. at 58.

Several appellants wrote to Empire, expressing their discontent with these changes and demanding an explanation. In response, Empire explained that the costs of maintaining retiree benefits at their previous levels had become prohibitive. J.A. at 69. Additionally, in response to some of the other retirees' letters, Empire cited to the reservation of rights clause included in "Your Handbook." J.A. at 82-83.

Plaintiffs filed their complaint in April 1999 in the Southern District of New York. Their amended complaint alleged seven claims challenging Empire's reduction in life insurance benefits for these retirees. The first two claims sought to enforce the terms of the life insurance plan and to recover benefits due under the plan's terms under ERISA § 502(a)(1) , 29 U.S.C. § 1132(a)(1). The third, fourth, and seventh claims contended that Empire breached its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Appellants' fifth claim contended that Empire was barred from reducing their life insurance benefits by the doctrine of promissory estoppel. Finally, appellants asserted a claim for penalties under ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1), due to Empire's alleged failure to provide timely plan information upon request.

The parties filed cross-motions for summary judgment. On October 24, 2000, the district court issued its opinion and order denying plaintiffs' motion and granting summary

judgment to Empire. *Abbruscato v. Empire Blue Cross and Blue Shield*, No. 99 CIV. 2970 (BSJ), 2000 WL 1585084, at *7 (S.D.N.Y. Oct. 24, 2000). The district court rejected plaintiffs' reliance on "informal communications" as evidence of their contractual vesting claim, and concluded that the relevant plan documents, including the 1987 SPD as well as the VSOP and VIP documents, clearly informed plaintiffs that Empire could modify or terminate the benefits. *Id.* at *2*5 The district court rejected plaintiffs' breach of fiduciary duty and penalty claims by reference to its discussion in *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV. 8520 (BSJ), 2000 WL 1538605, at *9-*10 (S.D.N.Y. Oct. 18, 2000). *Abbruscato*, 2000 WL 1585084, at *6. With respect to plaintiffs' promissory estoppel claim, the district court concluded that plaintiffs failed to demonstrate either the basic elements of promissory estoppel or that there were "extraordinary circumstances," as required in ERISA cases. *Id.* at *6-*7.

We review the grant of a summary judgment motion de novo, and "reversal is required if there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996) (citations and internal quotation marks omitted)

This appeal followed, and oral argument was heard in tandem with *Kunkel*.

## II. DISCUSSION

Appellants contend that Empire contractually promised to vest life insurance benefits through the relevant plan documents, retirement letters, Empire's position in an unemployment administrative proceeding, and informal communications. Appellants also assert a claim under the doctrine of promissory estoppel. Finally, appellants contend, as an alternative to their contractual vesting claim, Empire breached its

fiduciary duties under ERISA by making misleading statements concerning the retirees' life insurance benefits.[4]

### A. Contractual Vesting

Because the essence of the appellants' contractual vesting claim is identical to that asserted in *Kunkel*, we repeat below the standards set forth in that case:

> Plaintiffs claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which permits a civil action by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Essentially, plaintiffs assert under this section a "contractual right under a benefit plan." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999).
>
> "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *also Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (stating the general rule that under ERISA an employer welfare plan is not vested and that an employer has the right to terminate

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[4] Appellants do not assert on appeal their claim for penalties under ERISA § 502(c)(1).

> or unilaterally amend the plan at any time).[5] "[I]f a [plan] document unambiguously indicates whether retiree benefits are vested, the unambiguous language should be enforced." *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (*"Multifoods"*). Thus, even though Empire is "generally free" to modify its life insurance plan, if Empire promised vested benefits, those benefits will be enforced.

*Kunkel*, F.3d at ___, slip op. at [10-11]. In this Circuit, to avoid summary judgment on an ERISA contractual vesting claim, plaintiffs need only identify "specific written language that is reasonably susceptible to interpretation as a promise." *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999)

These appellants, unlike those in *Kunkel*, do not urge us to review the pre-1987 SPDs issued by Empire in search of this language. Instead, these appellants contend that the 1987 SPD contained in "Your Handbook," the VSOP and VIP documents, retirement letters, and Empire's representations in the context of unemployment benefits proceedings in New York state courts all demonstrate that Empire promised to vest life insurance benefits at the level stated upon retirement.

**1. The VSOP and VIP Retirees**

Appellants quote the VSOP and VIP language at length in support of their contractual vesting claim, emphasizing that both programs' materials include a reservation of rights clause within its health insurance description but *not* within

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[5] The parties do not dispute that life insurance benefits are such "welfare benefits" under ERISA. *See* 29 U.S.C. § 1002(1).

its life insurance description. Additionally, both documents describe life insurance benefits as a "lifetime" benefit. The VSOP description states: "If you have at least 5 years of vested service in the pension plan and your age plus completed years of service . . . equal *65 or more*, you are eligible for lifetime health insurance and life insurance coverage . . . J.A. at 142. The VIP description states: "Your insurance benefits may be extended to you for your lifetime *or* may be provided for an additional six months, depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify *or* if you would qualify *by adding five years to your age and five years to your service under the VIP*." J.A. at 167. We believe that both statements are reasonably capable of being interpreted to provide a vested lifetime life insurance benefit at the level described in the materials, so long as the VSOP or VIP retiree met the age and years of service qualifications.

The district court concluded that both the VSOP and the VIP materials contained a reservation of rights clause which effectively prevented any life insurance coverage from vesting. *Abbruscato*, 2000 WL 1585084, at *3-*4. We disagree. The VSOP provides that Empire "reserves the right to amend and/or terminate the VSO *Program* at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time." J.A. at 145 (emphasis added). We do not believe that this statement *unambiguously* reserves Empire's right to reduce the life insurance benefits provided by the VSOP. Instead, this language is capable of being interpreted to mean that Empire merely reserved the right to change the *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms.

The VIP document's purported reservation of rights is even less compelling. That document states: "Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, *up to the date on which that employee's Resignation and General Release and Covenant Not to Sue* becomes effective. Empire also reserves the right to announce new and different plans and programs as business needs require." J.A. at 170 (emphasis added). By its own terms, Empire's purported right to amend the VIP expired for these retirees. Further, Empire's ability to announce new and different plans in the future does not affect the terms under which these appellants retired.

Because the statements in the VSOP and VIP describing the lifetime benefits are susceptible to interpretation as a promise of vested benefits, and because neither the VSOP nor the VIP contain unambiguous reservation of rights clauses, we vacate the district court's grant of summary judgment to Empire and remand for further proceedings. Additionally, because we conclude that the VSOP and VIP documents are ambiguous, we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions. *See Kunkel*, F.3d at ___, slip op. at (16-17] (citing *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) (en banc) (Posner, J.)

**2. The Normal Retirees**

In contrast to the VIP and VSOP documents, we conclude that the 1987 SPD does not contain any ambiguity. Those appellants who retired in normal course claim that their life insurance vested pursuant to language included in the 1987 SPD, which provided that their life insurance in the amount of their annual salary at retirement "remains in force for the rest of [their] li[ves] , at no cost to [them] ." J.A. at 342. As noted above, however, the *same* SPD (albeit in a different section of the SPD) included a reservation of rights

clause, which stated: "The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. *The company also reserves its right to amend each of the Plans at any time.*" J.A. at 352 (emphasis added). Additionally, the introduction to the handbook containing the life insurance plan provided that Empire "expect[s] to continue the policies and benefits described here; but, [it] might someday have to change some of them or introduce new ones." J.A. at 339.

The district court concluded that, because "Empire . . . expressly reserved the right to amend or terminate the benefit program . . . [it] never expressed an intention to vest the life insurance benefits in the plaintiffs." *Abbruscato*, 2000 WL 1585085, at *5 With respect to the retirees who base their contractual vesting claim on the 1987 SPD contained in "Your Handbook," we agree with this conclusion. *Cf. Moore v. Met. Life Ins. Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (emphasizing that, under ERISA, "[a]utomatic vesting does not occur in the case of welfare plans," and rejecting a contractual vesting claim where the employer "clearly reserved in the plan documents and in the SPDs the right to amend or terminate the plans at issue")

In so concluding we decide the question left open by our decision in *American Federation of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 982-83 (2d Cir. 1997) ("*Multifoods*"). In *Multifoods*, we noted that we were "not faced with the question of how a document should be interpreted when it includes a general statement that all the benefits provided under the plan could be amended or terminated but also includes specific terms which could reasonably be interpreted as promising vested retiree benefits." *Id.* Because we ultimately concluded in *Multifoods* that the relevant SPD could not "reasonably be interpreted as promising vested benefits," we declined to resolve the issue. *Id.* at 982.

In *Joyce*, we came closer to resolving the question. In *Joyce*, the relevant SPD provided: "During your retirement, you and your covered dependents will have the same. coverage as you had while active at no cost to you." *Joyce*, 171 F.3d at 136. The SPD also contained a reservation of rights clause that "explicitly mention[ed] that the company 'reserves the right to end or amend'" the benefits coverage offered. *Id.* Additionally, the employer had distributed summary annual reports which informed employees that coverage would terminate should their Collective Bargaining Agreement terminate. *Id.* at 132. We concluded:

> Although we have not joined those circuits that have adopted the position that "a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually," we believe that the SPD's reservation of rights clause, when combined with the termination language of the [summary annual reports] , precludes any viable claim that the SPD served to vest the retirees' benefits.

*Id.* at 136 (quoting *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998)).[6]

Here, unlike in *Multifoods* or in *Joyce*, we have SPD language that *both* appears to promise lifetime life insurance coverage at a particular level *and* clearly reserves Empire's right to amend or terminate such coverage. Because the

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[6] Additionally, in *Devlin v. Transportation Communications International Union*, we affirmed the district court's conclusion that "'Plaintiffs' claim to vested welfare benefits is contradicted by the union's unambiguous reservation in the Plan documents of its right to amend the Plan.'" 173 F.3d 94, 103 (2d Cir. 1999) (quoting the district court opinion).

same document that potentially provided the "lifetime" benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits.

The Sixth Circuit has similarly concluded, where a group of General Motors retirees challenged a reduction in health coverage, that the relevant SPD provided that lifetime health coverage would be provided at no cost. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (en banc) The same SPD also provided that "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." The Sixth Circuit reasoned:

> We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change. . . . As the Third Circuit explained in a similar case, "'the promise made to retirees was a qualified one: the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided.'"

*Id.* (quoting *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 904 n.12 (3d Cir. 1995)).

In adopting this approach, we emphasize that our holding today is limited to those situations where the *same* document contains both the promise and the reservation of rights. In this vein, we distinguish the argument here from that in *Kunkel*, where one SPD promised lifetime benefits but an SPD issued subsequently contained a reservation of rights

clause. *Kunkel*, F.3d at —, slip op. at [4-5]. In *Kunkel*, we concluded that the relevant provisions were only those contained in the earlier SPD, and that the reservation of rights clause contained in the later SPD was ineffective as to those retirees. *Id.* at , slip op. at (14-16]

We therefore affirm the district court's conclusion with respect to the contractual vesting claim based on the 1987 SPD.[7]

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[7] As described in our decision in *Kunkel*, ___ F.3d at slip op. at [4], Empire distributed summary plan descriptions prior to 1987. These earlier SPDs contained no reservation of rights clause. In *Kunkel*, we held that these SPDs included language that was reasonably capable of being interpreted as promising to vest life insurance benefits upon eligibility for retirement. *Id.* at ___, slip op. at [14-18].

Unlike the *Kunkel* plaintiffs, these appellants do not base their claim to life insurance benefits on the pre-1987 SPDs. Instead, these appellants contend that they are contractually entitled to the contested life insurance benefits under either the 1987 SPD, entitled "Your Handbook," the VSOP documents, or the VIP documents, depending on retirement circumstances. Additionally, they rely on letters from Empire and other informal communications concerning the life insurance benefits. Although we are acutely aware of the anomaly created by this differing litigation strategy, there does not appear to be a principled analysis which affords these appellants relief in this appeal based on the pre-1987 SPDs. Appellants apparently did not argue this theory below nor did they present it on appeal, although they did include reference to the pre-1987 SPDs in their amended complaint. Indeed, during oral argument, counsel expressly disavowed any reliance on the pre-1987 SPDs.

Because we are remanding appellants' cause to the district court, it is possible that these appellants may seek to amend their complaint to add such a theory. Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." Because plaintiffs have alluded to these pre-1987 SPDs in their complaint and have generally alleged claims under ERISA § 502 (a) (1) to enforce the terms of the plan, it may be that the complaint "contains allegations that could support [such] a cause of action." *Manning v. Utilities Mut. Ins. Co.*, 254

[Footnote continued on next page]

**B. Promissory Estoppel**

In *Kunkel* we set forth the framework for a promissory estoppel claim under ERISA:

> "[P]rinciples of estoppel can apply in ERISA cases under extraordinary circumstances." *Schonholz*, 87 F.3d at 78. A plaintiff must satisfy four elements to succeed on a claim of promissory estoppel: "'(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.'" *Aramony v, United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999) (quoting *Schonholz*, 87 F.3d at 79) Additionally, "an ERISA plaintiff must 'adduce[] not only facts sufficient to support the four basic elements of promissory estoppel, but facts sufficient to [satisfy an] 'extraordinary circumstances' requirement as well.'" *Aramony*, 191 F.3d at 151 (quoting *Devlin v. Transp. Comms. Int'l Union*, 173 F.3d 94, 102 (2d Cir. 1999)). *Schonholz* provides an example of such extraordinary circumstances, where the employer used promised severance benefits to induce the plaintiff to retire. *Schonholz*, 87 F.3d at 79-80.

*Kunkel*, ___ F.3d at ___, slip op. at [18-19].

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[Footnote continued from previous page]
F.3d 387, 402 (2d Cir. 2001) (although affirming the dismissal of one type of claim, concluding that plaintiff should be allowed to replead to "allege more sufficiently" a different but related claim). We express no view as to whether the interests of justice favor allowing plaintiffs to amend to allege this theory specifically.

This claim is viable only with respect to those former employees who retired pursuant to either the VSOP or VIP. They contend that Empire intentionally induced them into taking early retirement and foregoing future years of salary and the opportunity to obtain other life insurance. Such intentional inducement, appellants argue, satisfies the "extraordinary circumstances" requirement set forth in *Schonholz*, 87 F.3d at 78-80. Empire contends that the VSOP and VIP documents cannot support a promissory estoppel claim, because given the reservation of rights clauses in these documents, plaintiffs cannot demonstrate that Empire promised lifetime life insurance benefits at a particular level. Empire further contends that appellants have failed to establish any "extraordinary circumstances."

We agree with appellants and therefore remand this claim to the district court. These appellants have sufficiently demonstrated the four basic elements of promissory estoppel plus "extraordinary circumstances" to avoid summary judgment. As described above, appellants have identified language in the VSOP and VIP documents that can reasonably be interpreted as a promise. Appellants have demonstrated reliance by retiring early based, in part, on this promise. Without question, the reduction in life insurance benefits injures these appellants. Finally, appellants have adequately demonstrated (assuming a fact finder concludes a promise was made) that an injustice will result should Empire's promise not be enforced.

Additionally, appellants have alleged sufficiently extraordinary circumstances surrounding these early retirement programs. As these documents state, Empire offered these early retirement incentive programs "as a financial incentive to those employees who voluntarily decide to resign or retire from Empire" because Empire "need[ed] to reduce [its] overall expenses." J.A. at 147 (VSOP), 171 (VIP). From these statements, it is reasonable to conclude that Empire used the

VSOP and VIP as an inducement to persuade appellants to retire; if a trier of fact were to so conclude, this would suffice as an extraordinary circumstance. *Devlin*, 173 F.3d at 102 ("[T]he remarkable consideration in *Schonholz* was the defendants' use of promised severance benefits as an inducement to persuade Schonholz to retire."). The reasoning of *Schonholz* supports our conclusion:

> If [defendant] had not transmitted the . . . letter [which promised severance benefits], Schonholz might never have submitted her resignation. [Defendant] then would have had to choose between firing Schonholz and keeping her on for an undetermined period. Each option presumably entailed disadvantages . . . because [defendant] chose neither. For instance, firing Schonholz might have affected employee morale . . . In other words, by agreeing to leave amicably, Schonholz conferred a benefit on [defendant] , one that may be quantifiable.

*Schonholz*, 87 F.3d at 79-80. By accepting the VSOP or VIP offer, appellants likewise have presumably conferred a benefit on Empire, and prevented it from having to resort to salary reductions, layoffs or firings during those years. A trier of fact could reasonably find that Empire intentionally induced appellants to accept the offer to retire in order to avoid having to take these less desirable steps. Because of these disputed issues of fact, summary judgment was inappropriate. We must therefore remand this claim to the district court.

### C. Breach of Fiduciary Duty

Appellants contend on appeal that, in the alternative to their contractual vesting claim, Empire breached its fiduciary duty by repeatedly providing misleading information about "lifetime" life insurance benefits at a particular level. ERISA § 404(a)(1) outlines fiduciary duties:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-. . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a). We have restated this statutory requirement: "A fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'" *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.) (quoting ERISA §§ 404(a)(1)(A) &(B)). An employer has "a duty to deal fairly and honestly with its beneficiaries." *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997).

Empire asserts here, as it did in *Kunkel*, that appellants cannot maintain this claim because "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." Appellee's Br. at 32. In today's decision in *Kunkel*, we rejected this assertion and concluded that the Supreme Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 515-16 (1996), contrary to Empire's assertion, "did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited

to such equitable relief as is considered appropriate." *Kunkel*, ___ F.3d at ___, slip op. at [28]

Empire also repeats here its argument that it was not acting in a fiduciary capacity, and therefore cannot be liable under this section. We rejected that contention in *Kunkel*, F.3d at , slip op. at [24]. We adopt *Kunkel's* holding that "Empire may have been acting as a fiduciary when it communicated with its employees and retirees concerning the contents of the welfare benefits plan." Id. (citing *Varity Corp.*, 516 U.S. at 502-03; *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001); and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998)).

As in *Kunkel*, we conclude here that there are genuine issues of material fact to be resolved by a trier of fact regarding this claim. In this vein, we repeat our analysis in *Kunkel*:

> In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time. "[W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (concluding that Unisys had breached

> its fiduciary duty where it "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life—even though as the district court concluded in rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits"); *cf. Becher v. Long Island Lighting Co.* (*In re Long Island Lighting Co.*), 129 F.3d 268, 271 (2d Cir. 1997) ("An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan.")

*Kunkel*, F.3d at , slip op. at [25-26]. We therefore remand this claim to the district court to "permit a trier of fact to evaluate Empire's communications with [appellants] for affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire has breached it." *Id.* at , slip op. at [26]

## III. CONCLUSION

For the reasons stated above, we affirm the district court's grant of summary judgment only with respect to the contractual vesting claim based on the 1987 SPD. As to the contractual vesting and promissory estoppel claims based on the VSOP and VIP, we vacate and remand to the district court for further proceedings. Finally, we likewise vacate and remand the breach of fiduciary duty claims.

## APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN F. BYRNES, WILLIAM A DE MAURO, FRANCIS J. DEVLIN, MICHAEL ELKINS, JERROLD I. ERLICH, BEVERLY GLICKERMAN, EUGENE F. HARRISON, GERALD HARRISON, RICHARD G. KUNKEL, JOHN F. LUCZUN, JOHN F. MULDOON, JOSEPH G. MURPHY, HARRY E. NICHOLSON, DANIEL ROSENBERG, DANIEL G. SANDERS, JAMES C. SNYDER, ANTHONY J. TRUHON, JOHN WANDZILAK JR., RONALD D. ZAMMIT, ELLEN PROPP, LOUIS LEVINE, JOHN SHURTLEFF, JULES LAMBEK, and STERLING CATHEY,

Plaintiffs,

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,

Defendant.

98 Civ. 8520 (BSJ)

OPINION
&
ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

### Introduction

This is an action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, brought by twenty-four former employees who retired from defendant Empire Blue Cross and Blue Shield ("Empire") between 1989 and 1993. Plaintiffs seek to enforce the terms of a life insurance plan provided by Empire to its retiring employees as those terms existed before 1998, when Empire significantly lowered the amount of its life insurance benefit to retirees. Plaintiffs seek injunctive and declaratory relief under §§ 502(a)(1) and 502(a)(3) of ERISA to enforce their

rights under the life insurance plan and to clarify their entitlement to future benefits, and monetary relief under § 502(a)(1) for Empire's wrongful reduction of their benefits; under §§ 404(a)(1)(A), (B) and (D) and for breaches of fiduciary duty, and under § 502(a)(1)(A) for failure to timely provide benefits information summaries to the plaintiffs. Plaintiffs have also asserted a claim of promissory estoppel. Plaintiffs now move for summary judgment pursuant to Fed. R. Civ. P. 56; defendants oppose and cross-move for summary judgment.

**Background**

The following facts are undisputed or as alleged by plaintiffs. Plaintiffs were all employed with defendant Empire at various times and for various lengths of time from as early as the 1940s to as late as 1993. All are now retired and are eligible participants in Empire's group life insurance plan. Throughout plaintiffs' employment with Empire, Empire maintained at no cost to its employees a group life insurance plan which provided for a certain amount of retiree life insurance benefits for eligible retirees, based on their salary. The plan provided for a base life insurance benefit of twice the employee's basic rate of annual salary while the employees remained employed with Empire. Upon retirement the level of the life insurance benefit would decrease by 10% and would decrease by that same amount on the next four anniversaries of the retirement date, so that four years after retiring, the life insurance benefit would have decreased by 50% and would therefore be equal to the employee's basic rate of annual salary. The plan provided that the amount of that benefit would then remain constant for the retiree's lifetime.

The retiree life insurance benefit plan was described in various employee handbooks distributed to employees throughout the years and in exit letters and severance package documents received by retirees at the time of their retirement from Empire. Plaintiffs allege that in each descrip-

tion of the plan, Empire announced its intention that the level of benefits would remain constant for the retiree's lifetime. Numerous oral representations by Empire management reaffirmed the employees' understanding of their entitlement to a constant amount of life insurance benefits for the rest of their lives. Plaintiffs allege that they relied on Empire's above-average benefits packages to counterbalance their below-average salaries.

In the summer of 1987, before any plaintiffs retired, Empire prepared an employee handbook entitled "Your Handbook." The extent to which that handbook was circulated to Empire's employees is contested; many plaintiffs dispute ever having seen or received Your Handbook. It is undisputed, however, that Your Handbook contained a Summary Plan Description ("SPD") of Empire's group life insurance plan, which for the first time explicitly reserved Empire's, right to modify, reduce or eliminate the retiree life insurance benefits under the plan. The portion of the SPD describing the life insurance benefit reads:

> your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage remains in force for the rest of your life, at no cost to you.

(Exh. 6 to Becker Aff., p. 36.) Six pages later, on the bottom of page 42, Your Handbook notes "[o]ther important information about your Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration. *Id.* at 42. In the Benefit Administration section, under the subheading "Plan Termination Provisions," Your Handbook notes:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits of its em-

> ployees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to amend each of the Plans at any time.

*Id.* at 68.

In July 1998, pursuant to a decision by Empire's board of directors, and after all of the plaintiffs had retired, Empire reduced its retiree life insurance benefit to $7500 for all employees retiring after January 1, 1989). All of the plaintiffs had retired after that cut-off date. Some of the plaintiffs subsequently wrote Empire in protest and received letters from Empire management which justified the benefit reduction by citing the reservation of rights language from Your Handbook. Many of the plaintiffs have had difficulty securing replacement life insurance coverage in the wake of Empire's decision to reduce their benefits.

Plaintiffs filed this action in December of 1998, alleging that Empire had wrongly deprived them of contractually vested retirement welfare benefits in violation of ERISA, and had breached its fiduciary duties by providing misleading information to the plaintiffs before it reduced the life insurance benefits and by providing insufficient information or justification to the plaintiffs after the benefit reduction. Plaintiffs have also claimed that Empire is estopped from denying life insurance benefits that it allegedly promised to them.

**Summary Judgment Standard**

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Callo v. Prudential Residential Servs.*,

*Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Corp.*, 369 U.S. 654, 655 (1962)). Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Nonetheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

## I.

There are two distinct types of employee benefit plans under ERISA: pension plans and welfare plans. *See* 29 U.S.C. §§ 1002(1) & (2)(A). Because Empire's plan involves life insurance, it is classified as a welfare plan. *See* § 1002(1).

"Unlike pension pan benefits, the benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time." *American Fed'n of Grain Millers, AFL-ClO v. International Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) (citations omitted) The reason for this rule is that "'the costs of such plans are subject to fluctuating and unpredictable variables.'" *Id.* (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). Because the same may be said for welfare plans that provide benefits to retirees, "retiree welfare benefits are generally not vested, and an employer can amend or terminate a plan providing such benefits at any time." *Id.*

Although there is no automatic vesting of benefits under an ERISA welfare plan, "if an employer promises vested benefits, that promise will be enforced." *Id.* at 980 (citations omitted). However, a commitment to vest welfare benefits "is not to be inferred lightly." *See Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998).

Plaintiffs claim that Empire, through its communications with them describing benefits that would last "for the remainder of their lives" made a contractual promise which the plaintiffs relied on and which vested in the plaintiffs the right to a constant amount of life insurance for the remainder of their lives. Plaintiffs claim that Empire breached that promise and violated ERISA when it reduced their life insurance benefit to $7500.

To determine whether Empire promised vested benefits to the plaintiffs, the Court looks to the relevant ERISA plan documents. *See Joyce v. Curtiss-Wright Corp.*, 172 F.3d 130, 133 (2d Cir. 1999). The scope of a welfare benefits plan is defined by the official plan documents and the summary plan descriptions. *See Moore*, 856 F.2d at 489 ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans."). The courts of this Circuit agree that if a plan document or SPD unambiguously indicates whether retiree benefits are vested, the unambiguous language should be enforced. *American Fed'n of Grain Millers*, 116 F.3d at 980. Therefore the Court looks to the plan documents and SPDs disseminated by Empire to the plaintiffs to discern whether those documents demonstrate Empire's intent to vest retirement life insurance benefits in these plaintiffs.

The only master plan document generated prior to 1987 which was submitted into evidence is the 1979 life insurance policy between New York Life Insurance Co. and Blue Cross

and Blue Shield Of Greater New York, Empire's predecessor entity. The policy defines "Life Insurance" as

> An amount equal to 200% of the employee's basic rate of annual salary, excluding overtime and bonuses, taken to the next higher multiple of $1,000, if not already an exact multiple thereof. In no event shall such amount exceed $600,000. On the earlier of (a) the day the employee retires, or (b) the day the employee attains age 65, the amount of his Life Insurance will be reduced by 10% and by an equal amount on each of the next four anniversaries of the initial reduction.

(Ex. 1 to Becker Aff., p. 3.)

There is no language in this document explicitly providing that the life insurance benefit described in the policy calculation will remain at that level for the remainder of the employee's life. Indeed, the policy specifically provides that

> an employee's insurance will terminate upon the occurrence of the first of the following events: . . .
>
> (2) modification of the policy to terminate insurance on the class of employees to which he belongs; or (3) termination of the policy.

*Id.* at 2. This plan document reserves Empire's right to terminate life insurance benefits as to a class of or all of its employees, and therefore constitutes evidence of Empire's intent not to vest insurance benefits in its retirees.

However, an employer's intention to vest welfare benefits in its employees can be divined from sources other than the formal plan documents. *See Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996); *Moore*, 856 F.2d at 490. Employers are also bound by promises made in

summary plan descriptions, or SPDs, which Congress intended to be a primary source of information regarding health benefits. *See* 29 U.S.C. § 1022; *Joyce*, 171 F.3d at 135-36. Therefore the fact that the 1979 insurance contract contains a reservation of Empire's rights to terminate the policy does not resolve the question as to whether these benefits had vested in the plaintiffs, because where the terms of a plan document and those of an SPD conflict, it is the SPD that controls. *See Grain Millers*, 116 F.3d at 982 (citing *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990)).

The parties dispute which SPD governs the plaintiffs' rights. Plaintiffs argue that the SPDs contained in employment handbooks and distributed to employees by Empire throughout the years preceding 1987 govern their rights. Plaintiffs cite a handbook distributed some time in the 1970s which provides:

> For eligible retirees; the group life insurance will be reduced 10% on the retirement date and in equal amounts on the next four anniversaries of the retirement date. That is, on the fourth anniversary of the employee's retirement, benefits will have been reduce [sic] 50% of the pre-retirement level *for the remainder of their lives*.

(Pl. Ex. A.) (emphasis added) They also cite another handbook distributed in the 1980s which provides:

> That is, on the fourth anniversary after the employee's birthday or retirement, benefits will have been reduced 50% of the pre-65 pre-retirement level and will remain at that level *for the remainder of their lives*.

(Pl. Ex. B.) (emphasis added).

Plaintiffs read these SPD provisions as a contractual promise by Empire to vest the described amount of life insur-

ance in them. Empire reads these provisions only as descriptions of the life insurance benefits existing at that time, not as a promise that those benefits would remain at any particular level forever. More significantly, however, Empire argues that the 1987 Your Handbook, which reserved the company's right to amend the plan at any time, superseded these prior employee handbooks, and that it is the relevant summary plan description governing the plaintiffs' rights.

Empire's argument that the 1987 Your Handbook SPD governs the plaintiffs' rights is founded on the argument that the plaintiffs' retiree life insurance benefits, if they vest at all, vest only upon the plaintiffs' retirement Consequently, Empire argues that because these employees had not yet retired when Empire expressed in Your Handbook in 1987 that benefits were not vested, Empire could modify or terminate the life insurance benefit at any time thereafter without violating any contractual promise to these plaintiffs.

The question for the Court then is whether the early SPDs cited by the plaintiffs express an intent to contractually vest retiree life insurance benefits in the plaintiffs *before they retired*, so that Empire could not subsequently divest those benefits by reserving their right to amend the life insurance benefit program in the 1987 Your Handbook.

ERISA plan contracts are construed according to federal common law. *See Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98, 107 (2d Cir. 1991); *Katz v. Colonial Life Ins. Co. of America*, 951 F. Supp. 36, 40 (S.D.N.Y. 1997). The federal common law governing ERISA "embodies common-sense canons of contract interpretation." *Brooke v. Home Life Ins. Co.*, 864 F. Supp. 296, 299 (D. Conn. 1994). Thus, "straightforward language in an ERISA policy must be given its natural meaning." *Fischman v. Blue Cross & Blue Shield of Conn., Inc.*, 775 F. Supp. 513, 515 (D. Conn. 1991) (citation omitted). A court must consider contractual language within the context of the entire agreement,

rather than focus on a particular term *See U.S. Fire Ins. Co. v. General Reins. Corp.*, 949 F.2d 569, 571-72 (2d Cir. 1991); *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). "Nor may an ambiguity be found where the contract has a definite meaning, and where no reasonable basis exists for a difference of opinion about that meaning." *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 149 (2d Cir. 1993). Contract language is only ambiguous "if, when considered objectively from the viewpoint of a 'reasonably intelligent person' it is subject to more than one meaning." *Katz*, 951 F. Supp. at 40 (quoting *Sayers v. Rochester Tel. Corp. Suppl. Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993)).

The Court finds that the pre-1987 Summary Plan Descriptions cited by the plaintiffs do not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired. Without clear and express language to the contrary, it was only reasonable for the plaintiffs to believe that if they retired *while those SPDs were in effect* that they would be entitled to the rights described therein. In other words, it is upon retirement, and not before, that plaintiffs' entitlement to the benefits would have vested.

Analogous case law supports our reading. In *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993), as in this case, the defendant employer had issued several SPDs that did not contain reservation of rights provisions. *See id.* at 932-33. Once this oversight had been discovered, the employer issued an SPD that reserved its right to terminate benefits. It then announced that it would eliminate retiree benefits offered to current employees who retired after a certain date. There was never a dispute over whether the employer could change the benefits it offered to those who had already retired. The company agreed that the benefits for those employees who had retired before the new SPD was issued had already

vested *upon their retirement* based upon the language of prior SPDs. The court then wrote as to the employees who had not yet retired when the reservation of rights language went into effect

> El Paso's statement in the pre-1985 SPDs that "[u]pon retirement, you . . . are automatically insured for retirement health care benefits and the Company pays the entire cost" discussed what the Plan then provided, not whether it would be offered in perpetuity. *As to yet-unretired workers, no commitments were made.*

*Wise*, 986 F.2d at 937-38 (emphasis added)

Similarly, Empire made certain promises to its employees in summary plan descriptions without reserving its right to terminate those benefits after retirement. But those SPDs only described the insurance benefits which were then available to retirees, and did not express any intention to offer them in perpetuity. The plaintiffs in this case had not yet retired when Empire expressly reserved the right to alter or terminate the life insurance benefit, and so any rights the plaintiffs might have had to retiree life insurance benefits as described in pre-1987 employee handbooks had not yet vested. *See id.* at 936 ("[t]he instant plaintiffs are asking us to do what neither Congress nor any other court has ever done—impose vesting for employees who had not yet retired as of the date of the disputed change."); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996) ("it was reasonable for the plaintiff employees . . . to believe that if they retired *while the . . . SPDs were in effect*, they would be entitled to the specified health benefits") (emphasis added); *Tusting v. Bay View Fed. Sav. & Loan Assoc.*, 789 F. Supp. 1034, 1043 (N.D. Cal. 1992) ("[p]laintiffs' argument that they acquired a right to vested retirement benefits prior to retirement . . . cannot be sustained."). Plaintiffs in their

memorandum of law supporting the motion for summary judgment even cite a case which illustrates this proposition, *Algie v. RCA Global Communications, Inc.*, wherein the court wrote:

> *once a triggering event occurs that entitles the employee to a specified benefit*, the employer is contractually and statutorily obligated to provide that benefit and may not retrospectively amend the plan to divest the plan participant of a payment that he was already entitled to receive.

891 F. Supp. 875, 884 (S.D.N.Y. 1994) (emphasis added). In this case the triggering event that would have entitled the plaintiffs to the benefits described in the pre-1987 SPDs was retirement before 1987's Your Handbook was distributed.

Accordingly, plaintiffs' rights are governed by the SPD which was in place when they actually retired. For plaintiffs Byrnes, DeMauro, Devlin, Ehrlich, Glickerman, Eugene Harrison, Gerald Harrison, Levine, Luczun, Rosenberg, Sanders, Shurtleff, Snyder and Truhon, who retired in the regular course of business, the relevant SPD is Your Handbook, which contains the same "for the remainder of your life" language that the plaintiffs contend represents a contractual promise by Empire to vest the benefits in them, but also contains language expressly reserving Empire's right to amend or terminate the life insurance benefit. Plaintiffs Cathey, Kunkel, Muldon, Murphy, Nicholson, Propp and Wandzilak did not retire in the regular course of business but instead accepted an early retirement offer from Empire known as the Voluntary Separation Opportunity Program ("VSOP"). The VSOP plan description describing their benefits also contains an explicit reservation of rights clause, which provides

> The Corporation reserves the right to amend and/or terminate the VSO Program at any time for any purpose. The Corporation also re-

> serves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time.

(Ex. 7 to Becker Aff.)

Plaintiffs Elkins, Lambek and Zammit also accepted an offer of early retirement from Empire known as the Voluntary Incentive Program ("VIP"). The documents describing the benefits for program participants also include an express reservation of rights clause, which provides "Empire also reserves the right to announce new and different plans and programs as business needs require." (Ex. 8 to Becker Aff.)

Plaintiffs have not argued that under these SPDs they are entitled to vested benefits, because they contend that the earlier SPDs govern their rights. However, contrary to plaintiffs' arguments, the pre-1987 SPDs do not govern their rights. Instead, each plaintiff's right to life insurance benefits is governed by an SPD that expressly notifies the plaintiffs of Empire's right to change any of the benefits it offers at any time. Although the plaintiffs do not appear to argue that they are entitled to vested benefits under these SPDs, the Court will nonetheless discuss whether these SPDs provided them with vested life insurance benefits.

It is an open question in this Circuit whether a general amendment provision in a welfare benefits plan is sufficient in and of itself to supersede plan language promising vested benefits. *See Berg v. Empire Blue Cross & Blue Shield*, 105 F. Supp. 2d. 121, 128-29 (E.D.N.Y. 2000)

This Court finds that Empire's reservation of rights clauses contained in Your Handbook and the VSOP and VIP documents are sufficient to negate any language cited by plaintiffs as evidence of a promise of vested benefits to them. Although when viewed alone outside the context of the SPDs in which it is found, the "for the remainder of your lives"

language cited by the plaintiffs might reasonably be interpreted as vesting life insurance benefits in them, the Court must consider contractual language within the context of the entire agreement rather than focus on a particular term. *See U.S. Fire Ins. Co. v. General Reins. Corp.*, 949 F.2d 569, 571-72 (2d Cir. 1991); *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). The SPDs governing plaintiffs' rights, in addition to containing a description of benefits for the remainder of plaintiffs' lives, also contain unambiguous language reserving Empire's right to amend or terminate the life insurance benefit. In *Devlin v. Transportation Communications Int'l Union*, 95 Civ. 0742 (JFK), 1997 WL 570512 at *5 (S.D.N.Y. Sept. 15, 1997), Judge Keenan granted summary judgment to the defendant employer on plaintiffs' claim that the employer violated a contractual promise of vested benefits when it amended its benefit plan. The employer changed the plan, which had previously provided that "contributions are not to be made by the employees," to require employees to make a monetary contribution to the plan. *See id.* at *2. Judge Keenan granted summary judgment based entirely on the defendant's unambiguous reservation of the right to modify the plan. The Second Circuit affirmed the grant of summary judgment to the defendant on plaintiffs' ERISA claims. *See Devlin v. Transportation Communications Int'l Union*, 173 F.3d 94, 103 (2d Cir. 1999).

In light of *Devlin* and of other Circuits that have held that a seemingly unambiguous promise of vested benefits for the remainder of retirees' lives is negated by an employer's inclusion in the same document of an express and unambiguous reservation of the right to amend or terminate the benefits, summary judgment for Empire is appropriate. *See, e.g., Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) ("we see no ambiguity in a [SPD] that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that

the terms of the current plan are subject to change."); *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, (3d Cir. 1995) ("the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided.").

Accordingly, pursuant to the unambiguous reservation of rights clause contained in Your Handbook and the VSOP and VIP documents, as well as the termination provisions contained in the 1979 insurance policy between New York Life and Empire, plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500.

This result is also sanctioned by ERISA policy. In *Moore*, the Second Circuit noted that Congress, by rejecting automatic vesting for ERISA welfare benefits, specifically recognized that employers required flexibility with respect to those plans because of fluctuating costs and business realities. *See* 856 F.2d at 492. Business realities relating to the rising costs and contingent liabilities of Empire's retiree life insurance benefit program are precisely the reasons Empire was forced to diminish the life insurance benefits at issue here. Empire's position is not unlike that of the defendant in *Wise*, where the court wrote:

> We are sensitive to Plaintiffs' earnest concerns and realize that today's decision works a significant hardship on workers who have invested, in many cases, most of their lives in service to the company. Across the nation, companies faced with rapidly rising costs and worried about their competitiveness are paring retiree benefits that were once considered sacrosanct. But ERISA simply does not grant employees unfettered rights to the corporate

> treasury. Employers need not abandon prudent business behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits.

*Wise*, 986 F.2d at 937.

This Court is also mindful that Empire's decision to reduce the plaintiffs' life insurance benefit works a hardship on them. However, Empire expressly reserved the right to amend or terminate the benefit program before any of the plaintiffs retired, and accordingly did not violate a contractual promise or ERISA when it exercised its reserved rights.

Plaintiffs' contentions that they did not receive or read Your Handbook[1] and therefore had no notice of Empire's newly stated reservation of rights do not change the result. An amendment to a welfare benefit plan is valid despite a beneficiary's lack of personal notice, unless the beneficiary can show active concealment of the amendment. *See Godwin v. Sun Life Assurance Co. of Canada*, 980 F.2d 323, 328 (5th Cir. 1992). In this case, even if the Court accepts as true that many of the plaintiffs had no actual notice of Empire's reservation of rights in the 1987 Your Handbook, record evidence submitted by Empire clearly demonstrates that it went to great lengths to ensure that all employees received Your Handbook, including asking employees to sign a sheet indicating receipt of the manual. Accordingly, Empire did not actively conceal its reservation of the right to amend or terminate the retiree life insurance program and plaintiffs' argument is rejected.

Furthermore, plaintiffs' appeal to extrinsic evidence in the form of exit letters to retiring employees and oral repre-

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[1] The plaintiffs that left Empire pursuant to the VSOP or VIP programs do not argue that they did not read or receive the plan documents.

sentations to employees while they were still working promising lifetime benefits is unavailing. Extrinsic evidence cannot be used to create an ambiguity which is not evident in the plan documents themselves. ERISA "bar[s] consideration of extrinsic evidence where a welfare benefit plan unambiguously reserves the plan administrator's right to amend and terminate the plan." *Moore*, 856 F.2d at 492 n.1.

Plaintiffs' motion for summary judgment on its claims to enforce the terms of the life insurance plan and for wrongful reduction of benefits under §§ S02(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3) is denied and defendant's cross motion for summary judgment on those claims is granted.

**II.**

Plaintiffs' claim that Empire breached its fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D). Plaintiffs' claim under § 404(a)(1)(D) is premised on Empire's reduction of life insurance benefits. Section 404(a)(1)(D) provides that a fiduciary must discharge its duties "in accordance with the documents and instruments governing the plan . . ." 29 U.S.C. § 1104(a)(1)(D). Plaintiffs claim that Empire violated the plan instruments when it reduced their life insurance benefits. As discussed above, Empire expressly reserved the right to amend the life insurance benefit in Your Handbook and the VSOP and VIP documents. Accordingly, Empire acted in accordance with the documents and instruments governing the plan in reducing plaintiffs' life insurance benefit, and plaintiffs therefore have no claim for breach of fiduciary duty against Empire based on Empire's amendment of the retiree life insurance benefit.[2] Plaintiffs' motion for

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[2] Furthermore, in order to prove a violation of ERISA § 404, a defendant must be a fiduciary of a benefit plan. *See Trustees Health and Welfare*

[Footnote continued on next page]

summary judgment on its claim of breach of Fiduciary Duty under ERISA § 404(a)(l)(D), 29 U.S.C. § 1104(a)(1)(D) is therefore denied, and defendant's cross-motion on that claim is granted.

Plaintiffs' fourth and seventh claims for relief for breach of fiduciary duties under §§ 404(a)(1)(A) and (B) are essentially founded on Empire's alleged dishonesty in making various representations to the plaintiffs that the retiree life insurance benefit would remain constant for the remainder of plaintiffs' lives. However, there is no indication in the record that Empire was dishonest or deceitful in its dealings with the plaintiffs. Empire included in its SPDS indications that it hoped and intended to continue to offer the plaintiffs the life insurance benefits that it had previously offered retirees, but

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[Footnote continued from previous page]
*and Pension Funds of Four Joint Boards v. Schlesinger Bros. Inc.*, 931 F. Supp. 204, 207 (S.D.N.Y. 1996). However, when an employer or other plan sponsor, for any reason, adopts, modifies or terminates a welfare plan, it does not perform an administrative function and does not act as a fiduciary. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, (1995). "Virtually every circuit has agreed that because these defined [fiduciary] functions do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995).

Therefore, even if Empire "wore two hats" as plaintiffs allege and acted as both an employer and a plan administrator, it wore the hat of employer when it amended the retiree life insurance benefit and cannot be liable for breach of fiduciary duty for that act. Under ERISA the employer can "wear two hats," and for purposes of enacting an amendment regarding plan design it wears the hat of the employer, not the administrator. *See id.* at 506-07; *see also Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 0742 (JFK), 1997 WL 570512 at *7 (S.D.N.Y. Sept. 15, 1997) *overruled on other grounds*, 173 F.3d 94 (2d Cir. 1999) (holding that it is well-established that a company does not act in a fiduciary capacity when deciding to amend a welfare benefits plan).

that it may in the future have to amend or terminate the program. Empire was not required under ERISA to begin every communication with the plaintiffs by restating the caveat that it had reserved the right to change the life insurance plan. *See Sprague*, 133 F.3d at 405. Furthermore, there is no indication that the representations that plaintiffs cite as being dishonest did not sincerely represent the intentions of Empire at the time those representations were made. There is no fiduciary duty to disclose contemplated changes in benefits before those changes become official. *See Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.) *cert. denied*, 519 U.S. 931 (1996). Accordingly, Empire did not describe its benefits to the plaintiffs in a way that was misleading or dishonest; rather it described the plan accurately by setting forth what it intended to continue to offer to retirees while expressly reserving the right to amend or terminate the benefits.

Accordingly, Empire did not breach its fiduciary duties to the plaintiffs when it communicated with them regarding the life insurance benefit plan. Plaintiffs' motion for summary judgment on its claims for breach of fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) is therefore denied; Empire's cross-motion on those claims is granted.

Plaintiffs also assert a claim for a violation of ERISA based on Empire's responses to letters of protest sent by the plaintiffs in the wake of Empire's reduction of the benefit. Plaintiffs claim that Empire violated § 104 of ERISA, 29 U.S.C. § 1024, when it responded to those letters by citing the reservation of rights language contained in Your Handbook. Section 104 requires a plan administrator, upon request of a plan beneficiary, to furnish a written copy of the latest updated SPD governing that beneficiary's rights. *See* 29 U.S.C. § 1024(b)(4). Plaintiffs' main contention in this regard is that Empire violated § 104 by citing the language from Your Handbook in response to plaintiffs' letters because it contends that Your Handbook did not govern the

plaintiffs' rights. However, as discussed above, the reservation of rights language in Your Handbook is the relevant SPD provision governing Empire's rights and plaintiffs' rights.[3] Empire did not breach its duties under § 104 by providing the reservation of rights language from that SPD in response to plaintiffs' requests for information.

Accordingly, plaintiffs' motion for summary judgment on its claim that Empire failed to comply with § 1024(b)(4) of ERISA is denied and Empire's cross-motion on that claim is granted.

Lastly, plaintiffs claim that they relied detrimentally on a promise of life insurance benefits and that Empire is now estopped from denying them the benefits they claim they are due under the pre-1987 SPDs. In the Second Circuit, the principles of estoppel can apply in ERISA cases only under extraordinary circumstances. *See Schonholz*, 87 F.3d at 78 (citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). The elements of a promissory estoppel claim in an ERISA action are: (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced. *See id.* at 79. To satisfy the extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part. *See id.*; *Berg*, 105 F. Supp. 2d 121, 130 (plaintiff must plead something more than reliance on a promise to the plaintiff's detriment, such as an employer intentionally inducing the employee not to purchase other insurance). Furthermore,

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[3] Plaintiffs allege in their amended complaint that plaintiffs Sanders, Rosenberg, and Snyder wrote inquiries to Empire. All three retired in the normal course of events and their benefits are therefore governed by Your Handbook. None of the plaintiffs who retired pursuant to the VSOP and VIP programs are alleged to have written inquiries to Empire.

ambiguity in a plan document as to whether benefits vest is insufficient when viewed alone or conjunctively to establish extraordinary circumstances. *See Berg* at 130.

Plaintiffs have testified that they continued to work at Empire despite relatively low wages only because they were relying on Empire's relatively copious benefits packages. They further testified that at this late stage in their lives they are finding it difficult to locate and afford replacement life insurance coverage. Although this testimony demonstrates reliance and injury, plaintiffs have not demonstrated that Empire induced them to act in one way or another or misled them *intentionally*, and consequently plaintiffs have not alleged the extraordinary circumstances necessary to state a claim of promissory estoppel under ERISA. *See Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir. 1999) (making a promise in order to induce *particular action* for employer's benefit only later to renege on the promise could amount to "extraordinary circumstances.") (emphasis added). Plaintiffs may have generally relied on receiving the benefits, but have not demonstrated that Empire offered those benefits in an extraordinary situation or in order to induce particular action on plaintiffs' behalf, such as in *Schonholz*, where the defendant offered benefits to the plaintiff for the very purpose of inducing her to retire. *See Schonholz*, 87 F.3d at 78. These benefits were offered in the ordinary course of business and with no demonstrated intent to induce a particular action. Plaintiffs' decision to work for or stay with Empire does not constitute an inducement satisfying the extraordinary circumstances requirement. If the Court were to consider it extraordinary every time an employee chose a job based in part on the quality of an employer's benefits package, the requirement of "extraordinary circumstances" would lose all meaning. Accordingly, plaintiffs' motion for summary judgment on its estoppel claim is denied and Empire's cross-motion on that claim is granted.

**Conclusion**

Plaintiffs' motion for summary judgment is denied; Empire's cross-motion for summary judgment is granted. The Clerk is directed to enter judgment for the defendant and to close this case.

SO ORDERED:

/s/
Barbara S. Jones
UNITED STATES DISTRICT JUDGE

New York, New York,
October 16, 2000

## APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| CALOGERA ABBRUSCATO, ET AL., Plaintiffs, v. EMPIRE BLUE CROSS AND BLUE SHIELD, Defendant. | 99 CIV 2970 (BSJ) OPINION & ORDER |

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

### Introduction

This action is brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, by former employees who retired under various circumstances from defendant Empire Blue Cross and Blue Shield ("Empire") between 1989 and July 1998. The case involves the same reduction of life insurance benefits under Empire's employee benefits plan that was the basis of related and consolidated lawsuits brought by another group of former Empire employees which the Court has recently decided in *Byrnes v. Empire Blue Cross & Blue Shield*, 2000 WL 1538605 (S.D.N.Y. Oct. 18, 2000).

As in *Byrnes*, plaintiffs here seek to enforce the terms of a life insurance plan provided by Empire to its retiring employees as those terms existed before July of 1998, when Empire significantly lowered the amount of its life insurance benefit to retirees. Plaintiffs seek injunctive and declaratory relief under §§ 502(a)(1) and 502(a)(3) of ERISA to enforce their rights under the life insurance plan and to clarify their entitlement to future benefits. Plaintiffs also seek monetary relief under § 502(a)(1) for Empire's wrongful reduction of

their benefits under §§ 404(a)(1)(A), (B) and (D) for breaches of fiduciary duty, and under §§ 502(a)(1) and 502(c)(1) for failure to timely provide benefits information summaries to the plaintiffs. Plaintiffs have also asserted a claim of promissory estoppel and seek to enjoin Empire from further reducing their benefits or retaliating against them. Plaintiffs now move for summary judgment pursuant to Fed. R. Civ. P. 56; defendants oppose and cross-move for summary judgment.

**Background**

This case differs from *Byrnes* primarily because these plaintiffs[1] argue that the contractual promises vesting their life insurance benefits derive from different sources than the plaintiffs in *Byrnes*. The *Byrnes* plaintiffs relied upon the descriptions of life insurance benefits in employee handbooks distributed by Empire in the early years of their employment prior to 1987. Plaintiffs here ask the Court to find that Empire promised to provide vested life insurance benefits to them based upon exit letters sent to them as retiring employees and based upon representations made by Empire in 1992 during administrative proceedings brought by other former Empire employees involving unemployment insurance benefits. This difference does not alter the result in this case from the result in *Byrnes*. For a fuller discussion of the general background common to both cases, see *Byrnes*.

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[1] This lawsuit is brought by fifty-three former employees of Empire, many of whom retired under different circumstances. However, despite these difference, all of the plaintiffs rely on the same arguments. Because none of the arguments prevails, the Court does not address the claims as to each individual plaintiff.

**Summary Judgment Standard**

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold Corp.*, 475 U.S. 654, 655 (1962)). Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Nonetheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

**I.**

Because Empire's plan involves life insurance, it is classified as an ERISA welfare plan. *See* 29 U.S.C. § 1002(1). The benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time. *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997). Although there is no automatic vesting of benefits under an ERISA welfare plan, an employer can vest benefits contractually. *Id.* at 980 ("if an employer promises vested benefits, that promise will be enforced.").

In this case plaintiffs offer only informal communications as evidence to support their claim that Empire contractually vested the life insurance benefit in them. Empire on the other hand has provided formal summary plan descriptions which demonstrate that Empire explicitly retained the right to modify or terminate the plaintiffs' benefits. Accordingly, plaintiffs' claims that Empire contractually vested benefits in them must fail.

First, the plaintiffs argue that exit letters they received as retiring employees vested their retiree life insurance benefit by contractual promise and rendered it unalterable. Plaintiffs' memorandum of law in support of this motion provides only a general model of the exit letters, which states in pertinent part:

> We would like you to know that some of our employee benefits will still be available to you and your spouse during your lifetimes as you retire early on [date]. For this reason, we want you to have the details in writing for your records. . . . The company provided life insurance that you have under our group program with New York Life Insurance Company will also be continued. You are presently insured for [$ amount dependent on retiree's salary]. This amount will be reduced by 10% on your retirement date [retirement date of retiree], and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement, each [anniversary date of retirement], until it reaches [$ amount of pre-retirement salary], *where it will remain constant for life.*

(Pl.'s Memo. at 6.) (emphasis added).

Second, the plaintiffs argue that the 1992 administrative proceedings support their claim that Empire never indicated

to them that their life insurance benefit might be eliminated or reduced in the future. Specifically, they point to the testimony of Michael Kent, Empire's Vice President of Human Relations, that Empire had no intention of modifying or eliminating the retiree life insurance benefit. (Pl.'s Memo. at 9.) Plaintiffs also cite a finding of fact by the Unemployment Insurance Appeal Board which stated "There was no indication that the normal benefits to which employees had or could become entitled would be eliminated or reduced at some later date." (Pl.'s Memo Ex. 11.) Plaintiffs further note that Empire incorporated that finding of fact in its Brief when the claimants appealed the Board's determination.

Empire responds that plaintiffs' rights are not governed by the exit letters or by the submissions and testimony, but rather by various official summary employee benefit plan descriptions distributed to the plaintiffs which expressly state that Empire had the right to modify or terminate plaintiffs' life insurance benefit. For those plaintiffs who retired in regular course of business Empire has submitted as it did in *Byrnes* the employee handbook entitled "Your Handbook." Your Handbook was prepared and distributed to Empire's employees sometime before 1989, when none of the plaintiffs here had yet retired. (Ex. O to Becker Aff.) Your Handbook contained a description of Empire's group life insurance plan which explicitly reserved Empire's right to modify, reduce or eliminate the retiree life insurance benefit under the plan. The portion describing the life insurance benefit reads:

> your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage remains in force for the rest of your life, at no cost to you.

(Ex. O to Becker Aff., p. 36.) Six pages later, on the bottom of page 42, Your Handbook notes "[o]ther important information about your Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.' *Id.* at 42. In the Benefit Administration section, under the subheading "Plan Termination Provisions," Your Handbook notes:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits of its employees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to amend each of the Plans at any time.

*Id.* at 68.

As in *Byrnes*, Empire argues that the rights of the employees who retired in the regular course of business are governed by the Your Handbook SPD, because Your Handbook was the relevant summary description of Empire's employee benefit plan when those plaintiffs retired. The Court agrees and notes that the Your Handbook SPD contains a provision expressly reserving Empire's right to amend or terminate the life insurance benefit.

Another group of plaintiffs did not retire in the regular course of business but instead accepted an early retirement offer from Empire known as the Voluntary Separation Opportunity Program ("VSOP"). Again, as in *Byrnes*, Empire has submitted The VSOP plan documents describing the plan participants' benefits. That summary contains an explicit reservation of rights clause, which provides:

> The Corporation reserves the right to amend and/or terminate the VSO Program at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require,

> although there are no plans to do so at this time.

(Ex. C to Pacernik Aff.)

A third group of plaintiffs accepted an offer of early retirement from Empire known as the Voluntary Incentive Program ("VIP"). The documents describing the benefits for program participants also include an express reservation of rights clause, which provides "Empire also reserves the right to announce new and different plans and programs as business needs require." (Ex. D to Pacernik Aff.)

At least one plaintiff retired pursuant to a workforce reduction and signed a Separation Agreement and General Release which provides that "Empire reserves the right to change or eliminate, at any time, these retiree medical and life insurance benefits." This agreement also provides that it is the sole and complete understanding between the parties. (Ex. E to Pacernik Aff.)

Finally, Empire also provided the plaintiffs who had not yet retired in 1993 with individual benefits summaries which were given to all Empire employees in that year. The summaries described the levels of the employees' individual benefits, including the life insurance benefit. (Ex. R to Becker Aff.) Those individual benefits summaries also clearly provide "Empire Blue Cross and Blue Shield reserves the right to change or terminate the Plans in whole or in part at any time." *Id.*

Based upon the summary plan documents submitted by Empire and described above, the Court finds that each plaintiff's right to life insurance benefits is governed by a document containing unambiguous language that expressly notifies the plaintiffs of Empire's right to change any of the benefits it offers at any time. Neither the exit letters nor any other evidence submitted by plaintiffs is sufficient to support their claim that Empire contractually vested life insurance in

them, because those letters and representations constitute informal communications under ERISA. When viewed against the formal SPDs submitted by Empire, the SPDs must prevail. *See Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (court looks to the relevant ERISA plan documents to determine whether employer promised vested benefits to the plaintiffs); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans.").

That the exit letters which plaintiffs cite do not qualify as plan documents or summary plan descriptions and therefore do not govern plaintiffs' rights is abundantly clear. 29 U.S.C. § 1022(b) sets forth the statutorily required elements of an ERISA summary plan description:

> The summary plan description shall contain the following information: The name and type of administration of the plan ... the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustee (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provision providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the re-

> cords of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance. . . .

Although the retiree exit letters do note the identity of the organizations through which benefits are provided, most letters contain none of the other statutorily required elements. Because they contain so few of the required elements, the letters cannot be considered summary plan descriptions. *See, e.g., Roccbia v. Prudential Ins. Co.*, 74 F. Supp. 2d 240, 247 n.4 (E.D.N.Y. 1999) (document containing only three of the 12 statutorily required categories of information was not an SPD). The exit letters are more akin to individual benefits summaries, which describe the effect of Empire's life insurance plan on the individual employees by setting forth the employee's final salary and calculating the amounts by which the life insurance benefit will decrease in the years following retirement. Such individual benefits summaries do not constitute substantive terms of the general life insurance plan or an SPD describing the life insurance plan. *See Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212, 225 (W.D.N.Y. 1999) (holding that erroneous individual benefits summary did not entitle employee to increased benefits). Instead, such summaries constitute informal communications which are incapable of amending Empire's life insurance plan and do not affect Empire's power to modify or terminate the plan. *See id.* at 226 (individual summaries are informal communications); *Moore*, 856 F.2d at 492 ("ERISA plans cannot be amended as a result of informal communications between an employer and plan beneficiaries."). Thus Empire's reserved right to modify or terminate the life insurance benefit is not undermined by the fact that some of the exit letters cited by plaintiffs did not specifically mention that ex-

pressly reserved right; the letters are informal communications rather than SPDs or plan documents.[2]

Therefore in determining whether Empire contractually promised vested life insurance benefits to the plaintiffs, the Court looks not to those exit letters and other representations but rather to the relevant plan documents and SPDs. The Court has decided in *Byrnes* that the unambiguous provisions reserving Empire's right to modify or terminate the benefit contained in Your Handbook and the VSOP, VIP and severance agreements negate any other isolated language in those documents which employees might read as a contractual promise of vested welfare benefits. Accordingly, plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500.

The exit letters and representations cited by the plaintiffs are at best extrinsic evidence and cannot be invoked to create an ambiguity which is not evident in the plan documents and SPDs themselves. ERISA "bar[s] consideration of extrinsic evidence where a welfare benefit plan unambiguously reserves the plan administrator's right to amend and terminate the plan." *Moore*, 856 F.2d at 492 n.1.

This Court is mindful that Empire's decision to reduce the plaintiffs' life insurance benefit works a hardship on them, as it does for the plaintiffs in *Byrnes*. However, Empire consistently and expressly reserved the right to amend or

---

[2] The Court notes that of the three exit letters provided to the Court, two contain an express reservation of Empire's right to modify or terminate the life insurance benefit and one does not. (*See* letters, Pl.'s Memo, Ex. 8; Def.'s Ex. F. to Pacernick Aff.) This fact serves to illustrate one of the primary reasons informal communications such as these cannot govern the plaintiffs' rights. If the Court made its determination of the plaintiffs' entitlement to benefits based on the differing exit letters in this case, similarly situated employees would have vastly different rights.

terminate the benefit program before any of the plaintiffs retired. As a result, Empire never expressed an intention to vest the life insurance benefits in the plaintiffs and therefore did not violate a contractual promise or ERISA provision when it exercised its expressly reserved rights to diminish the benefit. Plaintiffs' motion for summary judgment on its claims to enforce the terms of the life insurance plan and for wrongful reduction of benefits under §§ 502(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3) is denied and defendant's cross motion for summary judgment on those claims is granted.

**II.**

Plaintiffs also claim that Empire breached its fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D) by misleading the plaintiffs about their benefits and violated § 104 of ERISA in its responses to plaintiffs who had written Empire for a clarification of their rights in the wake of Empire's decision to modify their life insurance benefits. These claims are identical to the claims asserted by the plaintiffs in *Byrnes* and for the reasons stated more fully in that case, summary judgment in favor of Empire is granted.

**III.**

Lastly, plaintiffs claim that they relied detrimentally on a promise of life insurance benefits and that Empire is now estopped from denying them the benefits they claim they are due. In the Second Circuit, the principles of estoppel can apply in ERISA cases only under extraordinary circumstances. *See Schonholz v. Long Island Jewish Md. Ctr.*, 87 F.3d 72, 78 (2d Cir 1996) (citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). The other elements of a promissory estoppel claim in an ERISA action are: (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced. *See id.* at 79.

As in *Byrnes*, the plaintiffs here cannot establish the necessary elements of a promissory estoppel claim. First, the estoppel claims in this case, as in *Byrnes*, are premised on the breach of a promise that Empire never made: The promise of vested lifetime benefits. Empire only expressed a precatory desire to continue to provide the retiree life insurance to its employees while unambiguously reserving the right to amend or terminate plaintiffs' retiree life insurance. By exercising that right, Empire breached no promise.

Second, plaintiffs have also failed to establish the existence of extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part. *See id.*; *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir. 1999) (making a promise in order to induce particular action for an employer's benefit only later to renege on the promise could amount to extraordinary circumstances); *Berg v. Empire Blue Cross and Blue Shield*, 105 F. Supp. 2d 121, 130 (E.D.N.Y.) 2000) (plaintiff must plead something more than reliance on a promise to the plaintiff's detriment, such as an employer intentionally inducing the employee not to purchase other insurance). Plaintiffs' extraordinary circumstances argument differs from that in *Byrnes* because some of the plaintiffs have alleged more than that they relied generally on the benefits offered by Empire in deciding whether to continue working there. The early retirees have alleged that Empire induced them into the particular action of retiring early by promising them life insurance benefits in severance packages. However, the primary evidence plaintiffs cite to support their allegation of inducement to retire after the retiree exit letters, which could not have served as an inducement for plaintiffs to retire because the letters clearly show that they were received *after the plaintiffs had made the decision to retire.*

Furthermore, the retirement life insurance benefit that Empire offered in its various early retirement programs is exactly the same as the benefit offered to employees who retire in the normal course of events. Because Empire's alleged promise of continued life insurance benefits in its early retirement packages did not promise the plaintiffs a benefit to which they would not otherwise be entitled in the normal course of business, the promise does not constitute the type of "remarkable consideration" to induce the plaintiffs' early retirement which would support a finding of extraordinary circumstances. *See Devlin v. Transportation Communications Int'l Union*, 173 F.2d 94, 103 (2d Cir. 1999) (discussing *Schonholz*, 87 F.3d at 78).

Accordingly, plaintiffs' motion for summary judgment on its estoppel claim is denied and Empire's cross-motion on that claim is granted. Furthermore, defendant's motion for summary judgment on plaintiffs' claim for an injunction is granted. As the foregoing analysis demonstrates, the plaintiffs cannot prevail on the merits of their claims and are therefore not entitled to injunctive relief.

**Conclusion**

Plaintiffs' motion for summary judgment is denied; Empire's cross-motion for summary judgment is granted. The Clerk is directed to enter judgment in favor of the defendant and to close the case.

SO ORDERED:

/s/
Barbara S. Jones
UNITED STATES DISTRICT
JUDGE

New York, New York,
October 23, 2000

## APPENDIX E

**UNITED STATES COURT OF APPEALS**
**For The Second Circuit**
**United States Court House**
**40 Foley Square**
**New York, 10007**

Roseann B. MacKechnie
Clerk

At a stated term of the United Sates Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February two thousand two.

---

Kunkel, et al.

Plaintiffs-Appellants,

v. Dkt No: 00-9469

Empire Blue Cross

Defendant-Appellee.

---

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Empire Blue Cross.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/

Arthur M. Heller,
Administrative Attorney

## APPENDIX F

**UNITED STATES COURT OF APPEALS**
**For The Second Circuit**
**United States Court House**
**40 Foley Square**
**New York, 10007**

Roseann B. MacKechnie
Clerk

DC: SDNY
DC Docket: 99-cv-2970
DC Judge: Jones

At a stated term of the United Sates Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of February two thousand two.

---

Calogera Abbruscato, et al.

Plaintiffs,

Irma M. Alicea, et al. Dkt No: 00-9490

Plaintiffs-Appellants,

Empire Blue Cross and Blue Shield

Defendant-Appellee.

---

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the defendant-appellee.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:_____/s/_____
Arthur M. Heller,
Administrative Attorney

# APPENDIX G

## TITLE 29—LABOR

## CHAPTER 18—EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
## SUBCHAPTER 1—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
## SUBTITLE A—GENERAL PROVISIONS

* * * * *

**§ 1002. Definitions**

* * * * *

**(21)(A)** [A] person is a fiduciary with respect to a plan to the extent

**(i)** he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

**(ii)** he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or has any authority or responsibility to do so, or

**(iii)** he has any discretionary responsibility in the administration of such plan.

* * * * *

## SUBTITLE B—REGULATORY PROVISIONS
### *Part 2—Participation and Vesting*

**§ 1051. Coverage**

This part shall apply to any employee benefit plan . . . other than—

**(1)** an employee welfare benefit plan . . . . .

* * * * *

## SUBTITLE B—REGULATORY PROVISIONS
### *Part 4—Fiduciary Responsibility*

* * * * *

**§ 1104. Fiduciary duties**

**(a)(1)** [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

**(A)** for the exclusive purpose of:

**(i)** providing benefits to participants and their beneficiaries ;

* * * * *

**(B)** with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * * *

**(D)** in accordance with the documents and instruments governing the plan . . . .

* * * * *

## SUBTITLE B—REGULATORY PROVISIONS
### *Part 5—Administration and Enforcement*

* * * * *

**§ 1132. Civil enforcement**

**(a)** A civil action may be brought—

**(1)** by a participant or beneficiary—

* * * * *

**(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

**(2)** by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;

**(3)** by a participant, beneficiary, or fiduciary

**(A)** to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

**(B)** to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

* * * * *

## APPENDIX H

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a) Include brief statement of facts with page references to the moving papers.

Francis J. Devlin,

Plaintiff,

Richard G. Kunkel, et al.

Plaintiffs-Appellants

-against-

Empire Blue Cross and
Blue Shield

Defendant-Appellee

00-9469

Docket Number

MOTION INFORMATION FORM

Motion for Late filing of rehearing petition

MOTION BY: (Name, address and tel. no. of law firm and attorney in charge of case)

Gary H. Glaser, Esq. and Craig Pacernick, Esq.
Seyfarth Shaw
1279 Avenue of the Americas
New York, NY 10020
(212) 218-5500

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Meredith H. Savitt, Esq.
Hite & Savitt, P.C.
63 Colvin Avenue
Albany, New York 12206

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No
B. been obtained: ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired: ☐ Yes ☒ No
(Substantive motions only)

Requested return date: January 29, 2002
(*See* Second Circuit Rule 27(b).)
Has argument date of appeal been set:
A. by scheduling order: ☐ Yes ☒ No
B. By firm date/argument notice? ☐ Yes ☒ No
C. If yes, enter date: _____

**EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL**

Has request for relief been made below? ☐ Yes ☒ No
(*See* F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No
If no, explain why not:

N/A

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

N/A

Judge or agency whose order
is being appealed

---

**Brief statement of the relief requested:**

Acceptance of rehearing petition filed minutes late

By: (Signature of Attorney)
Signed name must be printed beneath.

Gary H. Glaser

Date: January 2, 2002

Empire Blue Cross and Blue Shield
Appearing for: (Name of Party)

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant

Appellee or Respondent: ☐ Plaintiff ☒ Defendant

**ORDER**

**Before: Hon. Dennis Jacobs, Hon. F.I. Parker, Hon. Sonia Sotomayor, *Circuit Judges***

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by

/s/
Arthur M. Heller, Administrative Attorney

Jan. 14, 2002

## APPENDIX I

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a)) Include brief statement of facts with page references to the moving papers.

---

Calogera Abbruscato, et al.,

Plaintiffs,

Irma Alicea, et al.

Plaintiffs-Appellants

-against-

Empire Blue Cross and
Blue Shield

Defendant-Appellee

---

00-9490

Docket Number

MOTION INFORMATION FORM

Motion for Late filing of rehearing petition

MOTION BY: (Name, address and tel. no. of law firm and attorney in charge of case)

Gary H. Glaser, Esq. and Craig Pacernick, Esq.
Seyfarth Shaw
1279 Avenue of the Americas
New York, NY 10020
(212) 218-5500

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Alvin Green, Esq.
Seham, Seham, Meltz & Petersen
122 East 42nd Street, Suite 1611
New York, New York 10168
(212) 557-9577

Has consent of opposing counsel:

| | |
|---|---|
| A. been sought? | ☐ Yes ☒ No |
| B. been obtained: | ☐ Yes ☒ No |
| Has service been effected? | ☒ Yes ☐ No |
| Is oral argument desired: (Substantive motions only) | ☐ Yes ☒ No |

Requested return date: January 29, 2002
(*See* Second Circuit Rule 27(b).)
Has argument date of appeal been set:

| | |
|---|---|
| A. by scheduling order: | ☐ Yes ☒ No |
| B. By firm date/argument notice? | ☐ Yes ☒ No |

C. If yes, enter date: _____

**EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL**

| | |
|---|---|
| Has request for relief been made below? (*See* F.R.A.P. Rule 8.) | ☐ Yes ☒ No |
| Any previous request for similar relief made to the 2nd Circuit? | ☐ Yes ☒ No |
| Would expedited appeal eliminate need for this motion? | ☐ Yes ☒ No |

If no, explain why not:

N/A

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

N/A

Judge or agency whose order is being appealed:

_____

**Brief statement of the relief requested:**

Acceptance of rehearing petition filed minutes late

By: (Signature of Attorney)
Signed name must be printed beneath.

Gary H. Glaser

Date: January 2, 2002

Empire Blue Cross and Blue Shield
Appearing for: (Name of Party)

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant

Appellee or Respondent: ☐ Plaintiff ☒ Defendant

**ORDER**

**Before: Hon. Dennis Jacobs, Hon. F.I. Parker, Hon. Sonia Sotomayor, *Circuit Judges***

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by

/s/
Arthur M. Heller, Administrative Attorney

Jan. 17, 2002

Supreme Court, U.S.
FILED
JUL 10 2002
CLERK

No. 01-1710

IN THE

# Supreme Court of the United States

EMPIRE HEALTHCHOICE, INC.,

*Petitioner*,

*v.*

JOHN F. BYRNES, *et al.*,

*Respondents*,

-and-

IRMA M. ALICEA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS JOHN F. BYRNES, *et al.*

MEREDITH H. SAVITT
HITE & SAVITT, P.C.
*Attorneys for Respondents*
*John F. Byrnes, et al.*
20 Corporate Woods Boulevard
Albany, New York 12211
(518) 435-1573

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit Court of Appeals correctly held that retiree life insurance benefits may have vested under the Employee Income Retirement Security Act of 1974 ("ERISA") where the applicable plan documents expressly promised long-term employees who satisfied age and service requirements with "lifetime" welfare benefits.

2. Whether the Second Circuit Court of Appeals correctly held that an employer-fiduciary may violate its fiduciary responsibilities under ERISA when the employer-fiduciary withholds employee welfare benefits in violation of the terms of the employee welfare plan and misrepresents plan benefit information to participants and beneficiaries of the plan.

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## COUNTERSTATEMENT OF THE CASE

This case involves enforcing an employer's promise to provide certain long-service employees with vested welfare benefits. Petitioner Empire Blue Cross and Blue Shield ("Empire") made its promise of "lifetime" benefits repeatedly in the welfare plan documents as well as other materials that described the welfare plan benefits. Empire also made the same promise of "lifetime" benefits to certain employees in order to induce them to voluntarily retire early. Although Empire later attempted to nullify its promise through a plan document, the Second Circuit found that after Empire made its promise — and its employees relied on that promise — Empire could not simply pretend that the promise did not exist.

In its continued quest to escape its obligations, Empire has petitioned this Court for a writ of certiorari. In doing so, however, Empire slants the facts of the case and misstates the Second Circuit's decision. With respect to the facts, they are clearly summarized in the Second Circuit's opinion, which has been reprinted in Appendix A of Empire's Petition (1a-24a). For the sake of brevity, Respondents respectfully refer the Court to the decision itself.

As for decision, the Second Circuit fundamentally recognized that Empire cannot, on the one hand, promise vested benefits to certain employees and then, years later, attempt to divest those employees of the benefits. That decision follows the ERISA case law of this Court. Nor does the import of the Second Circuit decision conflict with the case law of other Circuits, as Petitioner strenuously argues. Indeed, every Circuit has adopted the rule that while ERISA does not require employers to provide vested welfare plan benefits, employers are free to provide such vested benefits.

Empire avoids grappling with the oxymoron it has created by mincing words and then failing to admit that the welfare benefits vested. Even though Empire expressly and unconditionally promised the Respondents benefits for the "remainder of their lives", Empire asserts, as its premise in the Petition, that it did not expressly provide vested benefits. Empire then builds upon its incorrect premise to argue that the Second Circuit incorrectly ruled that Empire may be bound under ERISA by what Empire promised. Empire next claims that that ruling creates a major conflict in the circuits and "will lead to harmful results". Empire overstates its case.

## REASONS FOR DENYING THE WRIT

### I. This Case Does Not Present A Conflict in the Circuits

All circuit courts that have reviewed issues relating to the vesting of welfare plan benefits recognize that while ERISA does not require employers to provide vested benefits, employers are free to provide vested benefits if they so choose. *E.g. UAW v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999) (employers may "relinquish their right to unilaterally terminate [welfare plan] benefits and provide for lifetime vesting".); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) ("an employer may 'waive its statutory right to modify or terminate benefits' . . . by voluntarily undertaking an obligation to provide vested, unalterable benefits."); *Wise v. El Paso Natural Gas, Co.*, 986 F.2d 929, 937 (5th Cir. 1993) ("an employer's welfare plan itself may designate a vested benefit"); *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667 (6th Cir. 1998) ("employers may choose to vest welfare benefits by entering into a private agreement with their employees that is set forth in the plan documents."); *Bidlock v. Wheelabrator Corp.*, 993 F.2d 603,

604-05 (7th Cir. 1993) ("ERISA does not require the vesting of health or other 'welfare' benefits, as it does pension benefits . . . but equally it does not forbid their vesting by a written contract." ); *Jensen v. Sipco, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994) ("an employer may unilaterally modify or terminate medical benefits at any time 'absent the employer's contractual agreement to the contrary'") *quoting Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996) ("an employer or plan sponsor may unilaterally modify or terminate welfare benefits, unless it contractually agrees to grant vested benefits."); *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (the vesting of welfare plan benefits is a matter of "contractual interpretation").

This Court too has recognized that an employer may contractually provide its employees with vested benefits under ERISA. *Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 520 U.S. 510, 513 (1997) (an employer is free to adopt, modify or terminate welfare benefits "unless [the] employer contractually cedes its freedom"). There is thus no conflict over the principle that under ERISA, an employer binds itself to a certain welfare benefit scheme when the employer provides vested benefits.

Because Empire is unable to challenge that well-established rule, Empire looks beyond the rule to create a conflict that does not exist in this case. Empire states that the Second Circuit's approach in construing plan language to determine whether welfare benefits are vested is different from that of other circuits. Specifically, Empire jumps on the fact that the Second Circuit applied a "reasonable interpretation" standard in considering Empire's promise while other circuit courts have followed a "clear and express" standard. While Empire's observation may

be true, it is a distinction without any significance here. Because Empire's promise was clear and express, the promise is enforceable even under the standard that Empire seeks to invoke.

To be sure, Empire promised Respondents over and over again life insurance benefits in an amount no less than their final salary "for the remainder of their lives." The promise was not qualified or conditional. And, the promise was not subject to retraction. Empire did not have to make the promise to Respondents, but it did. It was part of an employee benefit package, which was communicated in the Summary Plan Descriptions and early retirement documents to Respondents. It reiterated that promise in "exit letters" and in other communications. Respondents, in turn, relied on the promise and rendered years of valuable services based on that promise as well as other promises made by Empire or voluntarily left their employment with Empire early. Thus, by any measure, each Respondent should have a right to receive life insurance benefits for the remainder of his/her life, as promised.

Even *Wise*, *supra*, upon which Empire so heavily relies, recognized that if an employer makes an unconditional promise to provide lifetime benefits, the employer may bound to provide the benefits under ERISA. *Wise*, *supra*, 986 F.3d at 937 ("It follows that [the employer] could have waived its statutory right to modify or terminate benefits and vested its workers contractually with the right to receive free lifetime coverage"). *See also Sengpiel v. B.F. Goodrich Co. supra*, 156 F.3d at 668 (where plaintiffs failed to show that they had a right to lifetime benefits due to the fact that the summary plan description did not "expressly guarantee lifetime benefits"); *Gable v. Sweetheart Cup Co., Inc., supra* 35 F.3d at 855 (where the court noted that ERISA authorizes an individual to enforce his "right to a fixed level of lifetime benefits" if such right is stated clearly and expressly in plan documents).

In short, with respect to the facts of this case, the circuit courts are in far more agreement than disagreement. Empire's attempt to exploit certain underlying differences and nuances among the circuit courts is unavailing as those differences are insignificant here. Respondents therefore respectfully submit that this case fails to present a conflict among the circuit worthy of a writ of certiorari.

## II. The Second Circuit's Decision is Consistent With ERISA's Policies

Empire further argues in its Petition that ERISA policies would be defeated if an employer is compelled to provide the benefits it promises through plan documents. Nothing could be further from the truth. "ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *quoting Shaw v. Delta Airlines Co.*, 463 U.S. 85 (1983). A core component of ERISA's statutory framework are the extensive reporting and disclosure rules that apply not only to pension benefit plans but also to welfare benefit benefits. ERISA §§ 101-111. The fundamental purpose of those rules is to ensure that employees are accurately apprised of the benefits to which they are entitled. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995).

Empire additionally questions the wisdom of any court decision that might enforce an employer's promise to provide vested welfare plan benefits. Using health insurance as an example, Empire appears to argue that since the marketplace for welfare benefits change over time, a court decision that enforces a long-standing promise to provide welfare benefits could be "dramatic and disastrous". Pet., p. 17. Aside

from the fact that the benefits at issue here involve garden-variety life insurance, rather than health insurance, Empire's argument is beside the point. It is up to an employer to determine whether, in light of ever-changing conditions, it is wise to provide vested welfare plan benefits. ERISA, including the case law thereunder, takes no position on that issue. The authority under ERISA does, however, provide that once an employer promises to provide a vested benefit, the employer must administer that benefit in accordance with the terms of the plan.

Indeed, any opposite result would frustrate the policies of ERISA. One need not look any farther than ERISA § 2, entitled "Findings and Declaration of Policy". That section recites, in relevant part, the express purpose of ERISA as follows:

> (b) It is hereby declared to be in the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

## III. The Second Circuit's Decision To Permit Respondents To Proceed Under Both ERISA § 502(a)(3) and ERISA § 502(a)(1)(B) Is Consistent with this Court's Case Law and Does Not Conflict with Other the Decisions of Other Circuit Courts

In making an alternative argument in support of its Petition, Empire again exaggerates distinctions between the Second Circuit decision and that of other circuits. Empire cites *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998) and *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999) for the notion that the Second Circuit decision parts with that of other circuits on the issue of whether the Respondents can recover under ERISA § 502(a)(3) for Empire's breach of fiduciary duty. Empire also suggests that the Second Circuit's decision is not consistent with the spirit of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Empire's position is not accurate.

First, in *Varity*, this Court clearly held that individual ERISA plan beneficiaries may bring an action under ERISA § 502(a)(3). Empire concedes that point. Pet., pp. 20-21. But, Empire then tries to distinguish *Varity* from this case on the ground that the plaintiffs in *Varity* could not bring a claim to recover benefits under ERISA § 502(a)(1) whereas Respondents here did assert such a claim. Empire then deduces that it is inappropriate to allow Respondents to proceed under ERISA § 502(a)(3) with respect to one of their ERISA claims because they proceeded under ERISA § 502(a)(1) with respect to another claim.

Empire misunderstands *Varity* and the Second Circuit's decision. *Varity* does not stand for the proposition that when

an ERISA plan beneficiary asserts a claim under ERISA § 502(a)(1), the beneficiary is then barred from asserting a separate and distinct claim that would otherwise be recoverable only under ERISA § 501(a)(3). Rather, *Varity* stands for the straightforward proposition that when an ERISA beneficiary is injured under ERISA, but recovery for *that* injury is not available under ERISA § 501(a)(1), the beneficiary may seek to recover under ERISA § 501(a)(3). Otherwise, according to this Court, ERISA would deny ERISA plan beneficiaries for injuries.

Here, the Second Circuit found that even though the express language of the ERISA plan documents offer a fact finder a reasonable basis to conclude that the life insurance benefits had vested, should the fact finder fail to reach that conclusion, Empire may still be liable to Respondents for repeatedly providing them with misleading information about their benefits. Pet., Appendix, pp. 19a-22a. After all, an employer, in its capacity as an ERISA fiduciary, has a fiduciary duty to avoid misrepresenting the terms and conditions of its employee benefit plans. *Varity*, 516 U.S. at 506.

In the same vein, the two cases upon which Empire principally relies, *Tolson v. Avondale Industries, Inc.* 141 F.3d 604 (5th Cir. 1998) and *Katz v. Comprehensive Plan of Group Ins.*, 197 F.3d 1084 (11th Cir. 1999), fall far short of any "direct conflict" with the Second Circuit's decision. In *Tolson*, the plaintiff had alleged, based on the terms of two ERISA plan documents, the wrongful denial of benefits under ERISA § 501(a)(1) and a breach of fiduciary duty under ERISA § 501(a)(3). *See Tolson v. Avondale Industries, Inc.* 1997 WL 539919 (E.D. La. August 29, 1997). The second claim, according to the district court, was "essentially the

*same* as the principal demand". *Id* at *7. As a result, the court found that the plaintiff could not proceed under the ERISA § 501(a)(3) when the same relief was available under ERISA § 501(a)(1). The Fifth Circuit decision adopted the district court's analysis wholesale. *Tolson*, 141 F.3d at 610-611.

Similarly, in *Katz*, *supra*, the circuit court affirmed the district court's finding that an ERISA beneficiary may not bring essentially the same claims under both ERISA § 501(a)(1) and ERISA § 501(a)(3). *Katz*, 197 F.3d at 1088. The circuit court explained that because ERISA § 501(a)(3) was meant to provide relief that cannot be obtained elsewhere under another provision, the beneficiary could not seek relief for an injury that is recoverable under ERISA § 501(a)(1). *Id.*

Thus, neither *Tolson* nor *Katz* conflicts directly (or even indirectly) with the Second Circuit's decision. *Tolson* and *Katz* hold that when an injury is recoverable under ERISA § 501(a)(1), that injury is also not recoverable through a second claim under ERISA § 501(a)(3). Those two cases, however, do not address what happens when an ERISA fiduciary may have had grounds, based on the terms of the plan document, to deny a benefit, but nevertheless misleads an ERISA beneficiary over and over again by misrepresenting the plan terms.

## IV. The Second Circuit's Decision Regarding Empire's Fiduciary Status Does Not Result in a Conflict in the Circuits

Empire asserts that the Second Circuit created yet another conflict in finding that Empire's reduction of benefits was a fiduciary act. This argument too can be easily dispelled.

In reducing the benefits, Empire did not merely modify the terms of an ERISA welfare plan, Empire took away a benefit that it had no right to touch. In other words, Empire divested Respondents of a vested benefit. ERISA itself states that an ERISA plan fiduciary must act "in accordance with the documents and instruments governing the plan". ERISA § 404(a)(1)(D). That does not mean, as discussed above, that an employer may not modify the terms of a plan when permitted to do so.

However, when an employer, within the discretion afforded to it by ERISA, provides an unalterable benefit to its employees, the employer, to the extent it is a fiduciary, must follow the terms of the plan. If the employer takes action to administer the plan contrary to the unalterable parts of the plan, the employer — like any other fiduciary — breaches its responsibility.

Almost all of the cases that Empire relies upon are inapposite, as they involved an employer's decision, as a plan sponsor, to make changes to non-vested benefits. Pet., pp. 25-26. That principle is not in dispute here. As for handful of "vested" benefit cases upon which Empire relies, they contain facts that are wholly distinguishable from those in the instant case. In *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994), a question was raised regarding the appropriateness of an employer's amendment of an ERISA pension plan, but the employer served exclusively as the plan sponsor. Unlike Empire, the employer was not the plan administrator.

Empire also refers to *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), for the proposition that even when an employer interferes with vested benefits, the employer's actions are not considered fiduciary in nature. *Hozier*, however,

did not involve an employer's interference with vested benefits. Rather, the employer in that case sought to modify certain severance benefits which, at the time of the attempted modification, had *not* vested. In fact, the *Hozier* court reasoned that although ERISA allowed the employer to modify the non-vested benefits unilaterally, ERISA required the employer to make the modification in writing, a requirement that the employer failed to meet in the case. 908 F.2d at 1162-64. *Hozier* did not address the issue of when an ERISA fiduciary takes action to deprive ERISA beneficiaries of their vested rights.

## V. The Second Circuit's Decision That Empire May Have Breached its Fiduciary Duty In Providing Misleading Information Does Not Result in a Conflict in the Circuits

On a final note, Empire asserts that the Second Circuit's finding that Empire may have violated its fiduciary obligation by promising Respondents lifetime benefits, but failing to note that such promise was revocable, is inconsistent with decisions of other circuits. Empire is wrong.

At the outset, Empire misstates the Second Circuit's holding. The Second Circuit merely recognized that a fiduciary may not promise to provide a vested benefit, but then fail to disclose that the benefit is revocable. That would violate, according to the Circuit Court, the fiduciary's duty to engage in honest and fair dealings with the welfare plan participants. Pet. Appendix, p. 212.

None of the decisions that Empire cites in its Petition stand for a contrary proposition. The Eighth Circuit in *Jensen v. Sipco*, 38 F.3d 945 (8th Cir. 1994), for example, merely observed that an ERISA welfare plan fiduciary ordinarily does

not have duty to state that welfare benefits are vested — an observation consistent with the general principle that welfare plan benefits ordinarily do not vest (absent express language). The Eighth Circuit's observation, however, is very different from the notion, advanced by Empire, that an ERISA fiduciary may tell plan beneficiaries that they have "lifetime" benefits, but then remain silent on revocability.

The reference to *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc) is also overstated. In *Sprague*, a purported class of certain retirees instituted an action against General Motors to challenge the company's reduction in its retiree health benefits. In finding that the retirees did not have a vested right to the health benefits at issue, the Eighth Circuit initially explained that "most of the summary plan descriptions unambiguously reserved [the company's] right to amend or terminate the [health care] plan". *Sprague*, 133 F.3d at 401. While not entirely clear from the Circuit Court's opinion, the Eighth Circuit also rejected additional estoppel and fiduciary duty claims made by a subset of retirees (i.e, early retirees) who asserted that the company had made additional representations to them regarding the health benefits. With that factual backdrop, the Eighth Circuit stated that the breach of fiduciary claim against the company could not survive because the company had no obligation under ERISA "to tell the early retirees at every possible opportunity that which it had told them many times before — namely, that the terms of the plan were subject to change". *Sprague*, 133 F.3d at 405. That holding does not mean, however, that the Eighth Circuit would embrace the view that a company is not breaching its fiduciary duty when it repeatedly refers to "lifetime" benefits, but fails to tell the plan beneficiaries, again and again, of a supposed reservation of rights.

Empire thus may not rely on other Circuit Court decisions as support for the principle that ERISA permits a fiduciary to recite a half of a promise and other information that would mislead plan beneficiaries with impunity.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1710

IN THE

# Supreme Court of the United States

EMPIRE HEALTHCHOICE, INC.,

*Petitioner*,

*v.*

JOHN F. BYRNES, *et al.*,

*Respondents*,

-and-

IRMA M. ALICEA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR THE ABBRUSCATO RESPONDENTS

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Can an ERISA[1] plaintiff claiming a welfare benefit be allowed to present his/her case to a trier of fact if the employer has made statements in Summary Plan Descriptions ("SPDs") and otherwise, which will support a valid contract claim by the plaintiff under established contract law?

2. Can an employer deny a plaintiff a previously promised welfare benefit by distributing a reservation of rights ("ROR") after the employee has begun his/her employment and has met the employer's retirement standards required for the benefit as enunciated prior to the later reservation of rights?

3. Does an employer's actions in making repeated communications with employees promising a lifetime welfare benefit, but failing to state that such benefit could be reduced at any time, constitute a breach of the employer's ERISA fiduciary duties?

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1. The Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. will be referred to herein as "ERISA."

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## STATEMENT OF THE CASE

This case involves a group of retired employees of Petitioner, Empire Blue Cross and Blue Shield ("Empire") who had been continuously promised in writing by Empire lifetime life insurance with a death benefit approximately equal to their annual salary at retirement (the "Life Insurance Benefit") throughout their period of employment. Following their retirement (pursuant to Empire's normal retirement plan), Empire unilaterally reduced the benefit to $7500, relying upon an ERISA Summary Plan Description ("SPD") issued in 1987. A second group of plaintiffs retired pursuant to early retirement plans offered by Empire which plans also featured the Life Insurance Benefit as an incentive to accepting the early retirement plan. Empire also attempted to reduce this benefit to $7500 after the offerees of the early retirement program accepted the offer and retired early. These early retirees based their claim on breach of contract, promissory estoppel or breach of fiduciary duty. It does not appear as if the decision of the Second Circuit with respect to the early retirees (other than with respect to breach of fiduciary duty claim) is the subject of Empire's petition (this Court has denied certiorari in the case of *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996), *cert. denied*, 519 U.S. 1008 (1996), which is the case upon which the Second Circuit based its decision as to the early retirees).

The facts of the case are well and accurately stated in the opinions of the Second Circuit in *Devlin et al. v. Empire Blue Cross and Blue Shield*, 274 F.3d 76 (2d Cir. 2001) and *Abbruscato et al. v. Empire Blue Cross and Blue Shield*, 274 F.3d 90 (2d Cir. 2001), which are attached to Empire's Petition.

The Second Circuit found that Empire had engaged in a course of conduct, which could be found by a trier of fact to have been an enforceable promise made by Empire to plaintiffs for the Life Insurance Benefit, which benefit could not be unilaterally revoked or decreased by Empire.

The Second Circuit also held that a trier of fact could find that Empire's course of conduct over the years with respect to Plaintiffs could be found to be a breach of Empire's fiduciary duties under the terms of ERISA.

Empire requested a rehearing *en banc* by the Second Circuit, which was rejected (not one judge of the Second Circuit having requested an *en banc* hearing).

## EMPIRE'S PETITION SHOULD BE DENIED AS IT DOES NOT MEET THE REQUIREMENTS OF THIS COURT'S RULES 10(a) & 10(c)

### I

### The Standard to be Met by an ERISA Welfare Benefit Claimant in Order to Reach a Trier of Fact

Empire's first requested ground for grant of its petition is an alleged conflict among the Circuits with respect to setting the standard to be used by District Courts in allowing an ERISA Welfare Benefit Plaintiff to overcome a defendant's motion for summary judgment in order to reach a trier of fact on the facts as alleged (Since ERISA cases do not allow for jury trials, the trier of facts in these cases is a Federal District Court Judge). This is a very limited issue with respect to allowing a trial on the facts and issues. The Second Circuit is not misapplying or misinterpreting the established law for

the determination of ERISA welfare claims. The Second Circuit's approach is more in line with the statute as stated at (29 U.S.C § 1001, emphasis added):

> — It is hereby declared to be the policy of this Act *to protect* interstate commerce and *the interests of participants in employee benefit plans and their beneficiaries*, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

The Second Circuit's approach provides for a more careful and reasoned consideration of the facts and circumstances involved in each particular case rather than permitting plaintiffs, who may well have a good case, from being "cut off at the pass" merely because of the absence of some particular term of art language. The Second Circuit is setting a procedure pursuant to which all of the facts relevant to the claim, as to whether or not the employer, through its acts, course of conduct and communications has made an enforceable contract with the employee can appropriately be examined[2]. Any difference between the Circuits on this issue arises from differing factual situations in each of the cases

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2. Empire's concern over the effect that the Second Circuit's approach will have on the "realities and expenses of modern civil litigation" (petition at p. 18) is misplaced. It is almost axiomatic that the plaintiffs in these cases are retirees of modest means without the resources to incur the legal representation expenses availed of by employers to resist claims.

involved. For example in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993) (which is heavily relied upon by Empire) there was a factual difference in that the employer had announced *in advance* the actual reduction of employee benefits and provided the affected employees a window of opportunity during which they could retire and avoid losing the benefits. Differences between decisions of the Circuits if they can be accounted for by differences in facts are not a ground for granting certiorari. As stated by Justice Harlan in the 18th Annual Benjamin Cardozo Lecture delivered before the Association of the Bar of the City of New York on October 28, 1958, "Moreover, differences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved" (Harlan, *Manning the Dikes*, 13 Record of NYC Bar Assn. 541, 552 (1958). Although *Wise* may simplify the court's dockets it fails to carry our the purpose of ERISA as it established an almost insurmountable barrier for employees with meritorious cases and allows for employers to engage in crafty behavior by making extensive promises to employees so long as the employer is careful not say the magic words dictated by *Wise*. *Wise* prevents the Court from conducting an adequate evaluation of the evidence to properly determine the claim. The Second Circuits approach allows for the court to determine the true intent of the parties. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) International Union et al. v. Yard – Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. den.*, 465 U.S. 1007 (1984).

The so-called "conflict" between the Circuits alleged by Empire is really (i) a matter of how the different circuits want to manage their trial dockets — whether or not to allow

ERISA cases to proceed beyond summary judgment to trial or (ii) a difference in the underlying facts of the cases involved.

The difference between the Circuits on this issue will not lead to trial forum shopping as alleged by Petitioner. Plaintiffs in these situations will still be bound by and will have to satisfy the venue and jurisdictional requirements of the Federal Courts. The Second Circuit's approach will not as Empire states open up employers to an onslaught of employee claims. The simple answer to that unjustified fear is — don't make promises you don't intend to keep.

## II

## The Issue of Pre-Retirement Vesting

Although welfare benefits are not vested under ERISA, all courts agree that employers are free to make contractual arrangements with employees to make the receipt of such benefits enforceable[3]. In interpreting and enforcing such contracts Congress intended in ERISA that the Federal courts would be guided by and would look to the general established principals of contract law. *In re White Farms Co.*, 788 F.2d 1186, 1191, (6th Cir. 1986). That is exactly what the Second Circuit did in *Devlin*. It looked at the record and came to the conclusion, based on established principals of contract law and after examining the intent of the parties, that Empire in

3. It should be noted that the Welfare Benefit we are here dealing with is life insurance, the future costs of which are readily and accurately obtainable from actuarial tables *and not* health insurance which is susceptible to future variations and increases in costs. Empire's treatment of this issue is limited to the discussion of the cost vagaries of health insurance.

its pre-1987 dealings with the retirees obligated itself contractually to provide the lifetime Life Insurance Benefit, and could not relieve itself of that obligation by means of the after the fact 1987 ROR. Likewise, in *Abbruscato*, the Second Circuit found that Empire had promised an unqualified lifetime Life Insurance Benefit to the early retirees, which was to be enforced. The cases cited by Empire in support of its position, *Maurer v. Joy Techs., Inc.*, 212 F.3d 907 (6th Cir. 2000) and *Houghton v. Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) present differences in facts, not law. In both cases there was no *lifetime benefits* language as was found to be present in the Empire documents given to its retirees. In *Sipco*, the retirees were warned of the *actual* reduction of benefits before they retired and they did not meet the pre-established retirement standards. In *Houghton* the Court stated the benefits could be amended *absent contractual arrangements to the contrary.* (*Houghton* at p. 957). Empire, in this case made contractual arrangement to the contrary. In *Maurer* the benefits arose under and terminated pursuant to collective bargaining agreements. Thus, on closer examination there is no conflict between the Circuits on this issue as the cases are differentiated on the basis of differences in facts.

## III

### The Second Circuit's Decision on the Fiduciary Issue Followed the Principals as Established by this Court

Empire's argument with respect to the breach of fiduciary claims are best dealt with by examining the following language of this Court set forth at the beginning of its decision in *Varity Corp. v. Howe*, 516 U.S. 489, 1996 where it stated:

> In conducting our review, we do not question the lower courts' findings of serious deception by the employer, but instead consider three legal questions. First, in the factual circumstances (as determined by the lower courts), was the employer acting in its capacity as an ERISA "fiduciary" when it significantly and deliberately misled the beneficiaries? Second, in misleading the beneficiaries, did the employer violate the fiduciary obligations that ERISA § 404 imposes upon plan administrators? Third, does ERISA § 502 (a) (3) authorize ERISA beneficiaries to bring a lawsuit, such as this one, that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations? We answer each of these questions in the beneficiaries' favor, and we therefore affirm the judgment of the Court of Appeals.

Those same three legal questions were examined and answered affirmatively by the Second Circuit in *Devlin* and *Abbruscato.*

In reaching its decision as to the breach of fiduciary obligation claim the Second Circuit carefully examined the facts involved in *Devlin* and *Abbruscato* and applied the established ERISA law, particularly the holding of *Variety.* The Second Circuit stated:

> "In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the

> life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at time" (*Devlin* at p. 88).

That statement is a clear and concise expression of an employer's fiduciary obligations under ERISA and applies the precepts of *Varity* to the *facts* of the case at hand.

Interestingly enough, most of the cases cited by Empire in support of its conflicts among the circuits argument, are cases that pre-date *Varity* and its interpretation of the fiduciary duty provisions of ERISA. The cases cited in support of the alleged differences between the Circuits are distinguished on the facts. In *La Rocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002) cited by Empire, the plaintiffs had received re-instatement of the benefit plan and were attempting to rely on a breach of fiduciary claim to recover something over and above the contractually defined benefits. *Tolson v. Avondale Industries Inc.*, 141 F.3d 604 (5th Cir. 1998) was a case in which a plaintiff, who was challenging the denial of coverage for a mental condition under a company health insurance plan, made a heroic attempt to invoke relief under a breach of fiduciary obligation theory. The court characterized the plaintiff's claim as a "self-proclaimed *res nova* argument . . . more correctly seen as specious sophistry, approaching frivolousness." That is certainly not the case here, as shown by the Second Circuit's endorsement of the validity of these plaintiffs' claims and can not serve as grounds for granting Empire's petition.

Finally, Varity following ERISA, holds that the Courts are to provide a deserving ERISA claimant with equitable relief where relief is not otherwise available. That carries out the true intent of the statute not withstanding hypertechnical and convoluted arguments of Empire to the contrary.

## CONCLUSION

These two cases are garden variety claims for enforcement of a contract (and were treated as such by the Second Circuit) which Empire has blown out of proportion in order to enlist this Court's aid in its unrelenting efforts to use every legal device at its disposal to avoid its obligations. This Court should not allow itself to be used to further these efforts. Accordingly, Empire's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Petitioner*,

v.

JOHN F. BYRNES, *et al.*,
*Respondents.*

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Petitioner*,

v.

IRMA M. ALICEA, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF HEALTH PLANS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS

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IN THE

# Supreme Court of the United States

No. 01-1710

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Petitioner*,

v.

JOHN F. BYRNES, *et al.*,
*Respondents.*

EMPIRE BLUE CROSS AND BLUE SHIELD,
*Petitioner*,

v.

IRMA M. ALICEA, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF HEALTH PLANS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the American Association of Health Plans, Inc. ("AAHP"), the Chamber of Commerce of the United States of America (the "Chamber"), and the American Benefits Council (the "Council") respectfully move for leave to file the attached

brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief. Its letter of consent has been lodged with the Clerk of the Court. Respondents have declined to consent.

The AAHP is the national association for the managed care community. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy and the provision of services to member health plans. Its membership includes health maintenance organizations, preferred provider organizations, third party health plan administrators, health care utilization review organizations, prepaid limited health service plans, and other integrated health care delivery systems. AAHP represents more than 1,000 managed health care organizations serving nearly 160 million Americans, the majority of whom are participants or beneficiaries of employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et seq.*

AAHP files this brief because of its interest in preserving the ability of the managed care community to arrange for quality, affordable health care pursuant to ERISA-covered benefit plans. The Second Circuit's decision would increase both the disclosure requirements and the liability risk under ERISA, which will increase health plan costs, thereby discouraging employers from sponsoring benefit plans.

The Chamber is the world's largest business federation and serves as the principal voice of the business community. The Chamber represents an underlying membership of nearly three million businesses and organizations, in every size, sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business.

The Council is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Its members also include employee benefit plan support organizations, such as actuarial and consulting firms, insurers, banks, investment firms, and other professional benefit organizations. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

The ability to establish and maintain employee benefit plans at an affordable cost is of vital importance to the members of the Chamber and the Council. The Second Circuit's decision would undermine this ability by imposing vague disclosure standards coupled with increased liability.

For the foregoing reasons, AAHP, the Chamber and the Council respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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## BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF HEALTH PLANS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF PETITIONERS

## INTEREST OF *AMICI CURIAE*

The interest of amici curiae, AAHP, the Chamber and the Council, is set forth in the motion accompanying this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and no person or entity other

## STATEMENT OF THE CASE

The *amici* incorporate the Statement of the Case in the Petition for Writs of Certiorari and briefly summarize the portions of the opinion of the United States Court of Appeals for the Second Circuit (App. 1a-24a) (Byrnes)[2] relevant to amici's arguments.

As required under ERISA, Petitioner, Empire Blue Cross and Blue Shield ("Empire"), distributed Summary Plan Descriptions ("SPDs") to participants in Empire's life insurance plan. The SPDs described the terms of the plan and stated that the life insurance coverage would continue until the retiree died. App. 4a-6a. The pre-1987 SPD did not recite Empire's right to amend or terminate the life insurance plan. App. 4a-5a. In 1987, Empire revised its SPD to expressly reserve its right to amend or terminate the plan. App. 5a-6a.

Petitioner also distributed to its employees descriptions of two voluntary workforce reduction programs—the "VSOP" in 1992 and the "VIP" in 1993—permitting voluntary resignation in exchange for certain benefits. App. 6a-7a. The VSOP and VIP offered life insurance benefits for retirees on substantially the same terms as the life insurance plan. App. 6a. In the documents describing the VSOP and VIP, there was no language directly accompanying the description of life insurance benefits that recited Empire's right specifically to change the life insurance benefit, but there was general reservation of rights language permitting Empire to

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than *amici* contributed monetarily to the preparation and submission of this brief.

[2] The Petitioner seeks review of two judgments of the United States Court of Appeals for the Second Circuit that involve "identical or closely related questions." Sup. Ct. R. 12.4. *Amici's* arguments focus on *Byrnes v. Empire Blue Cross and Blue Shield*, (one of the two cases). *Byrnes* was captioned *Devlin v. Empire Blue Cross and Blue Shield* below.

amend or terminate the programs and to adopt new or modified programs. App. 6a-7a.

In 1998, Empire amended the insurance plan to reduce coverage for retirees. App. 7a. Upon request of the retirees affected by the change, Empire provided a copy of the then-current, post-1987 SPD, which recited Empire's right to amend or terminate the life insurance plan. App. 24a.

The Court of Appeals concluded that employees who began working for Empire before the 1987 SPD was distributed may have the right to unmodified life insurance benefits for life. App. 15a. The Court of Appeals further found that "[i]n repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this [fiduciary] duty to deal honestly with the plan beneficiaries." App. 21a. This, in turn, according to the Court, gave respondents a claim for appropriate equitable relief under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), as well as claims for benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). App. 22a-23a.

## REASONS FOR GRANTING THE PETITION

Improperly stretching the boundaries of *Varity Corporation v. Howe*, 516 U.S. 489 (1996) ("*Varity*"), the *Byrnes* decision adds broad and ill-defined disclosure obligations derived from ERISA's general fiduciary duty of loyalty to ERISA's comprehensive statutory disclosure scheme. Also contrary to *Varity*'s guidance, *Byrnes* recognizes a cause of action under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), for breach of fiduciary duty for violating the new disclosure obligations, even though another section of ERISA provides an adequate remedy.

A broad, undefined, affirmative fiduciary duty to disclose information is unworkable given the complexity of ERISA

fiduciary relationships and unnecessary given ERISA's existing detailed statutory disclosure requirements. Moreover, allowing claims under section 502(a)(3) to proceed simultaneously with more specific ERISA claims that provide adequate relief will lead to additional, wasteful litigation, while providing no additional protections for plan participants. On both issues the *Byrnes* decision conflicts with the law in other circuits. Both issues also broadly affect the ERISA universe—increasing costs, uncertainty and potential liability for employers and unions that sponsor retirement and health plans, as well as third party administrators, financial services firms, and health insurers that provide services to such plans.

The Court should grant the petition to clarify that ERISA's duty of loyalty requires a fiduciary not to lie or affirmatively mislead plan participants, but not more, and to re-establish the limited purpose of section 502(a)(3) of ERISA as a "safety net" remedy, rather than a duplicative remedy. Varity, 516 U.S. at 512.

## I. THE *BYRNES* APPROACH TO FIDUCIARY DISCLOSURE DUTIES IS NOT SUPPORTED BY ERISA.

### A. Courts Should Not Supplement ERISA's Comprehensive Statutory Disclosure Scheme with Broad and Ill-Defined Disclosure Requirements Under ERISA's General Fiduciary Duty of Loyalty.

ERISA has an "elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995); *see* H.R. Rep. No. 93-533, p. 11 (1973); ERISA §§ 101-111; 29 U.S.C. §§ 1021-1031.

A key element of ERISA's disclosure scheme is the requirement that plan administrators distribute to plan participants SPDs written in plain terms understandable to the average participant. *Curtiss-Wright*, 514 U.S. at 83-84; ERISA § 102; 29 U.S.C. § 1022 SPDs must be provided to participants within 90 days of enrollment in the plan, copies of plan amendments must be provided regularly, new SPDs must be issued periodically, the latest SPD must be made available at the plan administrator's principal office and the plan administrator must provide the latest SPD to participants upon request. ERISA § 104(b); 29 U.S.C. § 1024(b). ERISA includes specific civil penalties if SPDs are not provided upon request. ERISA § 502(c)(1); 29 U.S.C. § 1132(c)(1).

In contrast, section 404(a) of ERISA, 29 U.S.C. § 1104(a), imposes traditional duties of loyalty and prudence on plan fiduciaries, modeled on the law of trusts. *Varity Corp. v. Howe*, 516 U.S. at 506. ERISA defines the term "fiduciary" broadly, making any person who has administrative authority or exercises investment discretion with respect to a plan, or who provides investment advice, a fiduciary. ERISA § 3(21); 29 U.S.C. § 1002(21). Under this functional definition, many persons may have fiduciary relationships with plans, in addition to the plan administrator, trustees or specifically enumerated "named fiduciaries." *Mertens v. Hewitt Associates*, 508 U.S. 248, 251-52 (1993).

ERISA is silent on whether its duty of loyalty provision imposes general disclosure obligations on plan fiduciaries to supplement the comprehensive and specific statutory disclosure obligations imposed on plan administrators. This question was partially addressed in *Varity*, where the Court adopted the straightforward but narrow rule that fiduciaries of ERISA plans violate their duty of loyalty if they knowingly and significantly mislead plan participants. *Varity*, 516 U.S. at 506. The Varity Court did not reach "the question of whether ERISA fiduciaries have any fiduciary duty to

disclose truthful information on their own initiative, or in response to employee inquiries." *Id.*

Lower courts have struggled to address the questions left unanswered by *Varity*. Courts have reached disparate results in similar factual circumstances, creating significant uncertainty with respect to disclosure duties and liability for the myriad of persons that serve as plan fiduciaries, including plan sponsors, administrators, trustees, financial services firms and health insurers. *Compare Byrnes*, App. 21a (duty to disclose the company's right to amend in letters describing early retirement program); *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (duty on HMO to disclose physician financial incentives) *with Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998) (no duty to disclose company's right to amend early retirement program in every communication regarding the program), *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552 (5th Cir. 2000) (no affirmative duty on HMO to disclose physician compensation).

*Byrnes* exacerbates the situation, adopting a vague, unworkable disclosure standard for employers communicating with plan participants. Rather than properly adhering to ERISA's specific disclosure requirements and a narrow reading of *Varity*, the Second Circuit found in *Byrnes* that Empire may have breached its fiduciary obligations by failing to provide information when it allegedly knew its failure would cause harm. App. 21a. In so doing, the court endorsed an *affirmative* duty of disclosure far exceeding ERISA's statutory reporting and disclosure requirements and the narrow fiduciary duty not to affirmatively mislead participants established by *Varity*.

Courts that have imposed broad disclosure obligations under ERISA's general fiduciary provisions have done so in light of the common law of trusts. *E.g., Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990). But

"trust law does not tell the whole story." *Varity*, 516 U.S. at 497. This Court has repeatedly made clear that trust law is only a starting point. To determine whether or the extent to which ERISA departs from trust law, "courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Id.*[3] Here, the balance weighs against following common law trust requirements in defining a fiduciary duty of disclosure under ERISA.

ERISA's comprehensive statutory disclosure scheme itself represents a major departure from the common law. Common law trustees have certain disclosure obligations, but not the elaborate or comprehensive types of obligations that ERISA imposes on plan administrators.

In their breadth and complexity, ERISA fiduciary relationships also are far removed from traditional common law trust relationships. Common law trustees typically administer a trust that holds property for the benefit of a limited group of persons (*e.g.*, a personal trust or family trust). A person generally does not assume fiduciary status unless he or she accepts designation as a trustee. *See* Restatement § 2; Bogert, Trusts and Trustees § 1 (2d ed. rev. 1992).

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[3] The Secretary of Labor, charged with interpreting and enforcing ERISA's fiduciary rules, reached a similar conclusion, finding that the common law of trusts should not be "mechanically applied to employee benefit plans." 44 Fed. Reg. 37225 (June 26, 1979) (Preamble to regulations under section 404(a) referring to H.R. Rep. No. 1290, 93 Cong., 2d Sess. 302 (1974) (ERISA's Conference Report)).

In contrast, ERISA imposes fiduciary duties in a much broader array of circumstances. *Mertens*, 508 U.S. at 251-52; ERISA § 3(21). Entities not formally designated as fiduciaries that have a relationship with a benefit plan, such as employers who sponsor plans, may become fiduciaries through conduct.[4] Thus, employee benefit plans often have many different fiduciaries with different responsibilities to a constantly changing plan population, which may number in the thousands. And, third party administrators, financial services firms and health insurers that administer and manage retirement and health plans may have fiduciary relationships with thousands of plans and millions of plan participants.

A statutory scheme of disclosure, rather than a general fiduciary standard based on the common law of trusts is the only scheme consistent with ERISA's central goal "to enable plan beneficiaries to learn about their rights and obligations at any time." *Curtiss-Wright Corp.*, 514 U.S. at 83. By giving the plan administrator the responsibility to make specific and clearly defined plan disclosures, ERISA ensures that participants know which person to seek information from and ensures that the plan speaks with one, consistent voice.[5] Moreover, purely as a practical matter, it would be unworkable to require all plan fiduciaries to disclose information above and beyond the statute's specific provisions. It would be virtually impossible for each and every plan fiduciary to know what facts relating to plan operations might be meaningful to thousands of differently situated participants and when disclosures should be made.

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[4] *Varity* illustrates the fact-specific inquiry necessary to determine fiduciary status. There, the Court delved deeply into Varity's conduct and the surrounding circumstances before concluding that the company's conduct transformed it into a fiduciary. 516 U.S. at 498-505.

[5] The plan "administrator," as defined in ERISA, is an entity whose identity can readily be ascertained. ERISA § 3(16); 29 U.S.C. § 1002(16).

Settled principles of statutory construction also suggest that where Congress expressly imposed comprehensive and specific disclosure obligations on the plan's "administrator," the courts should not imply broad, general supplementary duties of disclosure to the universe of all plan fiduciaries. *See Ehlmann*, 198 F.3d at 555-56; *Sprague*, 133 F.3d at 405. The Court followed this path in *Curtiss-Wright*, choosing not to recognize additional disclosure obligations under ERISA's fiduciary provisions. *Curtiss-Wright*, 514 U.S. at 84.

Given ERISA's comprehensive and specific disclosure obligations, where gaps emerge, the courts should resist adopting a patchwork of varying and burdensome disclosure obligations. That is the role of Congress, and it has not shirked that role. ERISA's disclosure rules have not remained static, particularly with respect to group health plans, where numerous changes already have been made.[6]

The ongoing legislative and regulatory efforts to define, and in some cases, expand, the duty to disclose specific, identifiable types of information to plan participants counsels against the approach to disclosure endorsed by the court of appeals. The approach in *Byrnes* "eschew[s] clear rules that might avoid litigation," *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002) (Scalia, J., dissenting) in favor of an indeterminate set of rules that the courts must draw by

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[6] In this regard, Congress established a specific disclosure rule relating to modifications of group health plans under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as well as specific disclosure obligations under the Newborns' and Mothers' Health Protection Act of 1996 and the Women's Health and Cancer Rights Act of 1998. ERISA §§ 104(b), 711(d), 713; 29 U.S.C. 1185, 1185b. Recent changes to regulations governing summary plan descriptions and claims procedures have also substantially enlarged plan disclosure obligations. *See* 65 Fed. Reg. 70226 (Nov. 21, 2000); 29 C.F.R. § 2520.102-3 (SPD regulations); 65 Fed. Reg. 70246 (Nov. 21, 2000); 29 C.F.R. § 2560.503-1 (claims procedure regulation).

analogy from trust law. The Court should grant review to bring clarity to an area that is becoming increasingly muddled.

### B. The Second Circuit's Decision Establishes an *Ad Hoc* Standard that Fiduciaries May Not Be Able to Meet.

The Second Circuit found that Empire had a fiduciary duty not to make "affirmative misrepresentations regarding plan benefits" and "to provide completely accurate plan information." App. 21a-22a. Even though Empire's communications to plan participants fulfilled these standards, the court concluded that Empire may have breached a fiduciary duty because it did not make further disclosure of information it already had disclosed. Fiduciaries may not be able to comply with this type of *ad hoc* disclosure standard.

The Second Circuit identified two possible deficiencies in Empire's communications with participants. First, the court found that "in repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries." App. 21a. But the 1987 SPD and the VSOP and VIP retiree letters that described the insurance benefit as remaining constant for life also described Empire's right to amend or terminate the benefit. App. 5a-7a. The fact that the retiree VSOP and VIP letters contained a general, rather than a life insurance-specific reservation of rights does not, by any reasonable standard, render them misleading or dishonest.

Even if the general statement in the retiree letters noting Empire's right to amend or terminate benefits were not sufficient disclosure, Empire's right to amend or terminate the life insurance benefit was clearly stated in the 1987 SPD. App. 5a-6a. Failing to repeat all of the information required in an SPD in every communication to participants is not misleading and is not required to satisfy any fiduciary duty

under ERISA's duty of loyalty provision. "There is, in our view, a world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and [the employer's] failure to begin every communication to plan participants with a caveat." Sprague, 133 F.3d at 405.

Finally, the court indicated that giving participants the then-current 1987 SPD upon request may have misled participants because their benefits were governed by the pre-1987 SPD. Even if the participants' benefits were governed by the earlier SPD—and, as petitioner explains, they were not—ERISA requires a plan administrator to provide participants upon request the "latest updated summary plan description." ERISA § 104(b)(4); 29 U.S.C. § 1024(b)(4). Thus, even fiduciaries who comply with ERISA's express disclosure standards could be viewed as having violated the Second Circuit's standard. Adequate disclosure requires clear standards that are consistently applied. *See Curtiss Wright*, 514 U.S. at 83. The Empire decision moves ERISA disclosure in the opposite direction.

## II. RECOGNIZING A CLAIM FOR BREACH OF FIDUCIARY DUTY WHERE OTHER, ADEQUATE REMEDIES ARE AVAILABLE IS CONTRARY TO THIS COURT'S GUIDANCE IN *VARITY* AND WILL LEAD TO ADDITIONAL, UNNECESSARY LITIGATION, INCREASING THE COST OF MAINTAINING A PLAN.

The Court has repeatedly emphasized that ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life and Annuity Insurance Company v. Knudson*, 534 U.S. 2004 (2002) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993) and *Nachman v. Pension Benefit Guaranty*

*Corporation*, 446 U.S. 359, 361 (1980)). The Court therefore has been "reluctant to tamper with an enforcement scheme crafted with such evident care. . . ." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

With that background, in *Varity*, the Court recognized section 502(a)(3) of ERISA as a "catch-all" remedy under ERISA's enforcement scheme, providing "appropriate equitable relief for injuries caused by violations that section 502 does not elsewhere adequately remedy." 516 U.S. at 504, 512. The Court limited relief under section 502(a)(3) only to those situations where there is no other adequate remedy. This is because, as a matter of statutory construction, the general relief provided in section 502(a)(3) should not be read to undermine the limitations in more specific provisions that provide, for example, a claim for benefits under a plan (section 502(a)(1)(B)) and a claim for breach of fiduciary duty on behalf of a plan (section 502(a)(2)). Id. at 512. Consistent with this reasoning, the Court recognized an individual claim for breach of fiduciary duty under section 502(a)(3) in *Varity* because the plaintiffs had no other remedy under ERISA.

Unlike the plaintiffs in *Varity*, the plaintiffs in *Byrnes* clearly have an adequate remedy in their claim for benefits under section 502(a)(1)(B). App. 22a-23a. The *Byrnes* decision ignores this, allowing the plaintiffs' overlapping claims for benefits under section 502(a)(1)(B) and for appropriate equitable relief for breach of fiduciary duty under section 502(a)(3) to proceed together. App. 23a. The sole basis for allowing both claims to proceed is that if plaintiffs' claim for benefits fails, then the claim for breach of fiduciary duty will be their only remedy. App. 22a. But this is not the standard that *Varity* established. *Byrnes* changes the "adequate remedy" standard in Varity to a "successful remedy" standard unsupported by the statute or case authority.

If the Court does not correct this erroneous interpretation of *Varity*, plaintiffs will routinely add fiduciary breach claims to their benefits claims. In addition to increasing the number of claims, in many cases, this also will increase the number of parties, as plan fiduciaries are added as defendants for the fiduciary breach claim. The multiplication of claims and parties will, in turn, increase the costs of maintaining benefit plans, to the detriment of plan sponsors and plan participants.

The highly-publicized litigation against the HMO industry filed by prominent class action attorneys illustrates this risk. The HMO actions included ERISA claims under section 502(a)(3) for breach of fiduciary duty for failure to disclose. These claims were dismissed by the district court because plaintiffs' claims could be adequately addressed under section 502(a)(1)(B). *In re Managed Care Litigation*, 185 F. Supp. 2d 1310, 1327 (S.D. Fla. 2002). Unless the *Byrnes* approach is decisively rejected, the HMO litigation and similar cases threatens to cripple health plans with increased costs.

This Court foresaw this risk in *Varity* and tried to limit it. In responding to arguments that allowing claims for individual relief for a fiduciary breach under section 502(a)(3) would wreak havoc with ERISA's carefully crafted enforcement provisions, the Court cautioned that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id.* at 515.

Most courts to consider the issue have maintained this distinction, recognizing an individual's claim under section 502(a)(3) only where he or she does not have a claim for benefits under section 502(a)(1)(B), regardless of whether the claim for benefits ultimately will be successful. *Compare, e.g., Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084, 1089 (11th Cir. 1999) ("the availability of an adequate remedy for *Varity* purposes, does not mean, nor

does it guarantee, an adjudication in one's favor"); *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604, 610 (5th Cir. 1998) (plaintiff's failure to prevail on his claim for benefits under section 502(a)(1)(B) does not make his alternative claim for fiduciary breach under section 502(a)(3) viable), *with Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 148-49 (2d Cir. 1999) (recognizing fiduciary breach claim under section 502(a)(3) where plaintiff had no claim for benefits under section 502(a)(1)(B)).

Limiting section 502(a)(3) as required by Varity not only comports with prevailing case law, the structure of ERISA's enforcement scheme and rules of statutory construction, but it also reduces duplicative or frivolous claims that increase the cost of maintaining a plan. This, in turn, preserves the delicate balance Congress sought to achieve between encouraging employers to establish benefit plans and protecting the rights of participants under those plans. *Varity*, 516 U.S. at 497.

## CONCLUSION

The petition for writs of certiorari should be granted.

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IN THE

# Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

JOHN F. BYRNES, ET AL.,

*Respondents.*

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

IRMA M. ALICEA, ET AL.,

*Respondents.*

**On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

As the petition makes clear, the court of appeals created or exacerbated multiple splits of authority among the federal circuits with respect to the questions presented in the petition. The decisions below:

- adhere to the view that "ambiguous plan language" can suffice to create vested ERISA welfare benefits, a standard that is directly contrary to the "clear and express language" test employed by five other circuits;
- hold that retiree welfare benefits can vest even before retirement, in conflict with three other circuits;
- permit claimants to maintain breach of fiduciary duty claims under § 502(a)(3) of ERISA where a claim for benefits under § 502(a)(1)(B) is also available, contrary to the law of six other circuits;
- allow an employer's amendment of an ERISA welfare plan to constitute a fiduciary act, contrary to the decisions of this Court and of three other circuits; and
- deem the failure to disclose in plan communications the non-vested nature of welfare plan benefits a breach of fiduciary duty, whereas five circuits reject any duty to disclose such information.

In response, the *Byrnes* respondents rely on inapplicable arguments concerning legal propositions that are simply not in dispute, mischaracterize the decisions below, and posit specious distinctions with respect to the circuit conflicts presented here. The *Alicea* respondents[1] fare no better, implau-

[1] Respondents who were plaintiffs in the second case below, *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), *reproduced at* Pet. App. 25a-46a, have referred to themselves as the *Abbruscato* respondents in this Court. As noted in the petition, however (Pet. 1 n.2), Calogera Abbruscato did not perfect an appeal to the Second Circuit, and accordingly is not a respondent in this Court. *See* Pet. App.

*sibly attempting to dismiss the legal rules applied* by the court below—which require trial as to claims that would not survive summary judgment in most other circuits—as merely a matter of docket management.

Respondents' contentions cannot obscure the fact that the decisions below adopt rules of federal law that are inconsistent with the rules applied by other federal circuits, concerning matters of great national importance that affect the ERISA welfare plans of many millions of American workers and retirees. This Court's review is essential to bring clarity to these issues, which are marked by an ever-increasing divergence of authority among the circuits in an area of the law that demands national uniformity.

## I. The Circuit Conflicts Over The Proper Standards For Determining Whether And When ERISA Welfare Plan Benefits Have Vested Are Squarely Presented Here And Merit Plenary Review

**1.** Respondents effectively concede that the circuits are sharply divided over the proper legal test for determining whether ERISA welfare plan benefits have vested. *See, e.g.*, Pet. 11-16 (discussing the circuit conflict); *Byrnes* Opp. 3-4 ("Empire's observation [regarding the conflicting standards] may be true"). Respondents' concession in this regard is well advised; the Second Circuit itself acknowledged the "circuit split as to the summary judgment rules for contractual vesting," Pet. App. 12a, but nonetheless adhered to its view that mere ambiguity can create a triable issue of fact on the question of vesting. *Id.* at 10a-12a, 36a. As amply demonstrated in the petition (Pet. 12-15), that holding is consistent with the law in three other circuits, but squarely at odds

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25a (case caption); SUP. CT. R. 12.6 (only "parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties" in this Court). For the sake of accuracy, therefore, this reply brief will refer to those respondents as the *Alicea* respondents. *See* Pet. 1 n.2.

with the test adopted by the Third, Fourth, Fifth, Sixth, and Tenth Circuits, which provides that welfare plan benefits do not vest unless an intent to vest is set forth in "clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993).

Rather than confront the implications of this stark circuit conflict, the *Byrnes* respondents first argue that "employers are free to provide vested benefits" under ERISA welfare plans. *Byrnes* Opp. 2-3. That proposition is simply beside the point, however, because the question presented in the petition is not whether welfare plan benefits *can* vest, but rather what legal standard courts must use in determining whether such benefits *have* vested. It is that latter question that continues to divide the circuits and merits this Court's review.

The *Alicea* respondents take a different tack, acknowledging the circuit conflict but suggesting that the Second Circuit's test is preferable to the "clear and express language" rule. *Alicea* Opp. 2-4; *see also Byrnes* Opp. 5-6. Respondents' halfhearted attempts to defend the Second Circuit's "ambiguous plan language" test are unpersuasive. The Second Circuit's test has no statutory basis, creates substantial uncertainty and need for litigation, threatens to impose massive liability on unsuspecting employers and ERISA plans, and undermines Congress's express refusal to require vesting in the welfare plan context. *See* Pet. 16-19. And in any event, respondents' arguments regarding the purported merits of the "ambiguous plan language" rule are irrelevant at this stage of the proceedings, because those arguments do nothing to lessen the importance of the question presented or the need for this Court to resolve the circuit conflict.[2]

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[2] The *Alicea* respondents also assert that "the venue and jurisdictional requirements of the Federal Courts" will prevent widespread forum shopping attributable to the divergent vesting rules employed in different regional circuits. *Alicea* Opp. 5. To the contrary, however, under ERISA's venue provision (29 U.S.C. § 1132(e)(2)), corporate defendants can be

The *Alicea* respondents also contend that the conflict among the circuits is simply "a matter of how the different circuits want to manage their trial dockets." *Alicea* Opp. 4. That contention is absurd. Rules of law that determine the elements of the prima facie case a plaintiff must establish in order to avoid summary judgment are quintessentially substantive in nature, and are precisely the types of rules that this Court reviews many times each Term.[3]

Ultimately, both sets of respondents retreat to the assertion that, regardless of which of the conflicting legal rules is the correct one, "Empire's promise was clear and express" and thus "the promise is enforceable even under the standard that Empire seeks to invoke." *Byrnes* Opp. 4; *see id.* at 1-2; *Alicea* Opp. 5-6. That bald assertion, however, is belied by the Second Circuit's decisions below, which expressly conclude that the relevant documents are ambiguous.[4]

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sued in any district in which they are subject to personal jurisdiction. *See, e.g., Brightway Adolescent Hosp. v. Hawaii Mgmt. Alliance Ass'n*, 139 F. Supp. 2d 1220, 1225 (D. Utah 2001) (collecting cases); *see also* 28 U.S.C. § 1391(c). Thus, plaintiffs will have little difficulty selecting a favorable forum in which to assert claims for allegedly vested ERISA welfare plan benefits. And even leaving aside the clear danger of forum shopping, it is intolerable for the standards governing vesting of ERISA welfare benefits to vary widely from region to region, especially in view of "ERISA's concern for securing *national uniformity* in the administration of employee benefit plans." *Boggs v. Boggs*, 520 U.S. 833, 842 (1997) (emphasis added).

[3] Oddly, the *Alicea* respondents suggest that "the decision of the Second Circuit with respect to the early retirees" is not "the subject of Empire's petition." *Alicea* Opp. 1. To the contrary, the Second Circuit's ruling with respect to the *Alicea* early retirees rests on its erroneous adoption of the "ambiguous plan language" rule, and is directly at issue here. *See* Pet. App. 35a-36a; *see also* Pet. 11-12 (quoting *Alicea* decision).

[4] *See* Pet. App. 15a ("Because of the ambiguity of the language, the ultimate determination of whether Empire promised lifetime benefits should be left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language." (from *Byrnes* opinion)),

Respondents cannot possibly satisfy the "clear and express language" test established by *Wise v. El Paso Natural Gas Co.* and its progeny. None of the isolated statements they seize upon constitutes the requisite "precise language denying the right to withdraw benefits." *Wise*, 986 F.2d at 938. Indeed, in direct refutation of respondents' attempts to distinguish *Wise*, the Second Circuit explicitly recognized that "*Wise* . . . presents facts similar to those presented here." Pet. App. 10a. "Notwithstanding these similarities," however, the Second Circuit permitted respondents to proceed to trial—not because of any purported factual distinctions between these cases and *Wise*, but because the Second Circuit "take[s] a different view" of the proper legal test. *Id.* at 11a.[5]

Thus, this case squarely presents the issue that has divided the circuits, as the Second Circuit itself correctly acknowledged. Plenary review is warranted.

**2.** In addition to the foregoing circuit conflict, the decisions below also conflict with precedents from other circuits holding that retiree welfare benefits do not vest prior to retirement. Pet. 15-16. The *Byrnes* respondents offer no response at all on this point, and the *Alicea* respondents con-

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24a (remanding "to illuminate the ambiguities present in the pre-1987 SPDs" (from *Byrnes* opinion)), 36a ("because we conclude that the VSOP and VIP documents are ambiguous, we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions" (from *Alicea* opinion)).

[5] The *Alicea* respondents attempt to distinguish *Wise* on the ground that the employer in *Wise* announced the reduction in benefits in advance and gave employees an opportunity to take early retirement. *Alicea* Opp. 4. But that proffered distinction is irrelevant. Under the Second Circuit's test, the employer in *Wise* would have been *precluded* from obtaining summary judgment because its failure to include an express reservation-of-rights clause in its earlier SPDs would have given rise to a jury question regarding whether its promised health insurance benefits had vested. And once benefits have vested, an employer cannot terminate them—regardless of how much "advance notice" it provides.

tend only that two of the decisions relied on by petitioner—*Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 919 (6th Cir. 2000), and *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994)—are distinguishable because neither case involved alleged promises of lifetime benefits. *Alicea* Opp. 6. That distinction lacks any legal significance, however, because those courts, as well as the Fifth Circuit in *Wise*, adopted a legal rule that flatly contradicts the rule applied by the court below. These other circuits have held that retiree welfare benefits do not vest before retirement (Pet. 15-16), whereas the court below held that such benefits *do* vest before retirement. Pet. App. 12a-15a. Whether the facts allegedly giving rise to pre-retirement vesting involve lifetime benefits is immaterial to the legal question of whether retiree welfare benefits *do* vest before retirement. Thus, respondents fail to offer any plausible explanation for why this Court should not resolve the clear circuit split on this issue.

## II. The Circuit Conflicts Created By The Second Circuit's Rulings On The Fiduciary Duty Issues Are Squarely Presented And Merit Plenary Review

**1.** As demonstrated in the petition (Pet. 20-24), the decisions below conflict with cases from no fewer than six other circuits that expressly preclude ERISA plaintiffs from pursuing both a breach of fiduciary duty claim under § 502(a)(3) and a denial of benefits claim under § 502(a)(1)(B). In response to this showing, respondents simply ignore the bulk of the conflicting circuit decisions cited in the petition (Pet. 23), presumably because there is no colorable basis for distinguishing those cases from the contrary decisions below. Respondents do attempt to distinguish two of the cases cited in the petition—*Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998), and *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999)—but their efforts in that regard are wholly unpersuasive.

According to the *Byrnes* respondents, *Tolson* and *Katz* are inapposite because in those cases the claims asserted under § 502(a)(3) were essentially the same as the benefits claims under § 502(a)(1), whereas the fiduciary duty claims at issue in *Byrnes* are purportedly "separate and distinct" from the *Byrnes* respondents' claims for benefits under § 502(a)(1)(B). *Byrnes* Opp. 7-9. In reality, however, *Tolson* and the other cases cited in the petition are on all fours with this case. In *Tolson*, for example, the plaintiff alleged wrongful denial of benefits under § 502(a)(1)(B) as well as a § 502(a)(3) claim based on alleged misrepresentations regarding the availability of those same benefits. 141 F.3d at 607, 610; *see also Katz*, 197 F.3d at 1087-89. That is *precisely* the scenario presented here: Respondents' breach of fiduciary claims under § 502(a)(3) involve alleged misrepresentations concerning whether they were entitled to the benefits that they seek in their separate claims under § 502(a)(1)(B), and arise out of the same alleged injury. Thus, respondents' attempt to distinguish *Tolson* and *Katz* is entirely without merit.[6]

Respondents' arguments regarding *Varity Corp. v. Howe*, 516 U.S. 489 (1996), are equally unpersuasive. Far from authorizing simultaneous claims under both § 502(a)(1) and § 502(a)(3), as respondents would have it (*Byrnes* Opp. 7-8), *Varity* in fact makes clear that § 502(a)(3) relief can be pursued only in the absence of other grounds for relief under

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[6] The *Byrnes* respondents' argument that their fiduciary duty claims are "separate and distinct" from their benefits claims is further refuted by their own brief in opposition, which reveals that their fiduciary duty claims are in fact inextricably intertwined with their benefits claims. *See Byrnes* Opp. 10 (arguing that Empire's alleged status as a fiduciary rests on the assertion that "Empire divested Respondents of a vested benefit"—the very assertion that lies at the heart of the benefits claims). Likewise, the Second Circuit necessarily viewed these claims as intertwined, since it predicated Empire's fiduciary status on the purported viability of the benefits claim. Pet. App. 20a.

§ 502. *See* 516 U.S. at 512, 515. This Court in *Varity* allowed the plaintiffs to proceed with a breach of fiduciary duty claim *only* because they had no ability to proceed under § 502(a)(1)(B); "they were no longer members of the ... plan and, therefore, had no 'benefits due [them] under the terms of [the] plan.'" 516 U.S. at 515; *see also* Pet. 20-21. Respondents suffer from no such disqualification here. Thus, under *Varity* and the law of six other circuits, respondents would not be entitled to bring a breach of fiduciary duty claim. The contrary conclusion reached by the court below is irreconcilable with these decisions, and nothing in respondents' oppositions demonstrates otherwise.[7]

**2.** As previously demonstrated (Pet. 24-28), the Second Circuit's holding that a mere plan amendment can constitute a fiduciary act creates yet another square conflict among the authorities. Respondents do not even cite, much less distinguish, this Court's controlling precedents, which categorically foreclose the rule of law announced below. *See* Pet. 25 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). The *Byrnes* respondents do contend that there is a distinction between revocation of non-vested benefits and revocation of allegedly vested benefits, but they fail to explain why an employer's status as a fiduciary should vary depending on the nature of the benefits at issue, and nothing in this Court's cases or in the conflicting decisions from other circuits supports this proffered distinction.

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[7] Although the *Alicea* respondents discuss in some detail the facts of two cases cited by petitioner—*LaRocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002), and *Tolson v. Avondale Industries, Inc.*, 141 F.3d 604 (5th Cir. 1998)—they make no attempt to explain how the facts of those cases relate to respondents' argument. *Alicea* Opp. 8. As the petition explains (Pet. 22), these cases clearly show that the First and Fifth Circuits have adopted a legal rule that is flatly inconsistent with the position of the court below.

Moreover, the Sixth and Seventh Circuits have squarely held that *even where vested rights are at issue*, an employer's modification of a welfare plan is not a fiduciary act. *See Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1377-78 (6th Cir. 1994) (holding employer's reduction of vested benefits invalid, but not a fiduciary act); *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1002 (7th Cir. 1993) (holding employers' selection of method for determining withdrawal liability not a fiduciary act, even though it affected vested benefits). The *Byrnes* respondents' attempt to distinguish *Wulf* on the ground that the employer there was not the plan administrator (*Byrnes* Opp. 10) is a non sequitur. Plan amendment is a settlor function, not a plan administrator function, and thus an employer's status as plan administrator is irrelevant in this context. *Spink*, 517 U.S. at 890; *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990); *see generally* Pet. 27. Indeed, not even the Second Circuit below relied on the *Byrnes* respondents' proffered rationale; instead, it reasoned that an employer's cancellation of "vested" benefits can constitute the "exercise[] [of] discretionary authority with respect to the plan" and thus be a fiduciary act. Pet. App. 20a. That reasoning is irreconcilable with *Wulf*.

**3.** Finally, the *Byrnes* respondents attempt to muddy the waters concerning the circuit split on the question whether a claim for breach of fiduciary duty can lie for failure to disclose in plan communications that ERISA welfare benefits are not vested. *Byrnes* Opp. 11-13. In the first place, the *Byrnes* respondents misstate the holding below. The Second Circuit did not authorize a fiduciary breach claim based on a "promise to provide a vested benefit" coupled with a failure to disclose that the benefit is revocable, as the *Byrnes* respondents would have it. *Id.* at 11. Rather, the Second Circuit held that "if, on remand, the trier of fact determines that there was *no* promise to vest the life insurance benefits," Empire's failure to disclose the non-vested nature of the

benefits could give rise to liability for fiduciary breach. Pet. App. 21a (emphasis added). Thus, the *Byrnes* respondents' arguments, which rest on the allegedly misleading nature of a promise to "vest" benefits that are not in fact vested, are simply beside the point, because the theory of fiduciary liability approved by the Second Circuit proceeds on the assumption that there was *no* promise to "vest" benefits.

In any event, five other circuits have squarely rejected the Second Circuit's view that a failure to disclose the nonvested nature of welfare plan benefits can constitute a fiduciary breach. *See* Pet. 28-30 (citing cases). Without addressing the bulk of these conflicting authorities at all, the *Byrnes* respondents attempt to distinguish *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), as not involving alleged lifetime benefits, and *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc), as involving prior reservations of the right to amend. *Byrnes* Opp. 11-12. Those proffered distinctions are unpersuasive. Indeed, petitioners seriously misread *Jensen*, which *did* involve promises of "lifetime" benefits (*Jensen v. SIPCO, Inc.*, 867 F. Supp. 1384, 1389-90 (N.D. Iowa 1993); 38 F.3d at 950-51), but nonetheless held that "a welfare plan SPD is not required to disclose that plan benefits are not vested." 38 F.3d at 952. Moreover, Empire explicitly set forth its reserved right to amend its plans in the 1987 SPD (as well as in the VSOP and VIP documents), and thus *Sprague* is directly on point as well. Pet. App. 36a-37a.

## CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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# In the Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD, PETITIONER

*v.*

JOHN F. BYRNES, ET AL.

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## QUESTIONS PRESENTED*

1. Whether, under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, extrinsic evidence may be considered in determining whether benefits are vested under an employee welfare plan when the language of the plan is ambiguous on that issue.

2. Whether employee plan participants may combine, in a single action, a claim for benefits improperly denied (under 29 U.S.C. 1132(a)(1)(B)) and a claim for breach of fiduciary duty based on the misrepresentation of plan benefits (under 29 U.S.C. 1132(a)(3)).

3. Whether a "discretionary" act by a plan administrator to reduce vested employee welfare benefits may violate a fiduciary duty under ERISA.

4. Whether an employer breaches a fiduciary duty under ERISA by promising lifetime welfare benefits to employees without fairly and clearly disclosing that it reserves the right to change or terminate those benefits.

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* The first question presented in this brief corresponds to the first question presented in the petition. Questions 2, 3, and 4 in this brief state separately the three distinct issues that are subsumed within the second question presented in the petition. See Pet. Reply Br. 1.

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# In the Supreme Court of the United States

No. 01-1710

EMPIRE BLUE CROSS AND BLUE SHIELD, PETITIONER

*v.*

JOHN F. BYRNES, ET AL.

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. Petitioner seeks review of two decisions of the Second Circuit that involve former employees of petitioner who challenge a post-retirement reduction in their life insurance benefits. Pet. App. 2a, 26a.[1] Respondents retired at various times between 1989 and 1998. Some retired under petitioner's normal retirement program. Others retired under the Voluntary

[1] Although the two cases had different names at other stages of the litigation, this brief will follow the petition and call them *Byrnes* (Pet. App. 1a-24a) and *Alicea* (*id.* at 25a-46a).

Separation Opportunity Program (VSOP), an early retirement program offered in 1992, or the Voluntary Incentive Program (VIP), a similar program offered in 1993. *Id.* at 2a, 3a, 27a. The documents pertaining to each of those programs state that retirees will be provided, for the remainder of their lives, with company-paid life insurance coverage in an amount equal to their last annual salaries. *Id.* at 48a. After respondents retired, however, petitioner amended its benefits plan in 1998 to reduce their life insurance coverage to a flat $7500. *Id.* at 7a, 31a.

2. The relevant plan documents all contain the same benefit formula for retiree life insurance. They differ, however, in the extent to which a right to amend those benefits was reserved.

a. Two summary plan descriptions (SPDs) issued by petitioner before 1987 state that "retired employees, after completion of twenty years of full-time permanent service and at least age 55 will be insured" at a specified level "for the remainder of their lives." Pet. App. 4a-5a.[2] These SPDs contain no reservation of a right to amend. *Ibid.* The SPD issued in 1987, however, while stating that "your life insurance coverage *remains in force for the rest of your life, at no cost to you*," then further states (*id.* at 5a-6a, 28a):

> The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if neces-

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[2] The summary plan description (SPD) required by ERISA is to "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a).

> sary. The company also reserves its right to amend each of the Plans at any time.

b. The VSOP and VIP plans contain an express reservation of petitioner's right to adjust retiree health insurance benefits. Their description of retiree life insurance benefits, however, contain no such reservation. Pet. App. 6a-7a, 29a-30a. Each of those plans also specifies (in somewhat varying text) that:

> The Corporation reserves the right to amend and/or terminate the * * * Program at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time.

*Id.* at 6a, 29a, 58a-59a, 74a-75a (VSOP program); see *id.* at 7a, 29a-30a (VIP program). Neither the VSOP nor the VIP documents refer to the earlier SPDs. 00-9469 C.A. App. 534-571.

c. Petitioner also sent exit letters to many respondents on their retirement that describe the "employee benefits [that] will still be available to you and your spouse during your lifetimes." Pet. App. 72a. Those letters described the amount of life insurance coverage that would "remain constant for life" and said nothing about the possibility of any further changes or reductions in life insurance benefits after retirement. *Ibid.*

3. Respondents brought suit against petitioner under Section 502(a)(1)(B) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a)(1)(B), to determine their rights to future life insurance benefits. Pet. App. 2a, 27a, 32a-33a. The *Byrnes* respondents relied primarily on the pre-1987 SPDs and claimed that their insurance rights were vested prior to their retirement. The *Alicea* respondents relied pri-

marily on the provisions of the 1987 SPD and the VSOP and VIP documents.

In addition to their claim for vested benefits under Section 502(a)(1)(B), respondents sought relief under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), for alleged breaches of fiduciary duty. Respondents claimed that petitioner "repeatedly provid[ed] misleading information about 'lifetime' life insurance benefits" (Pet. App. 43a), in violation of the duty under Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A), (B), to deal fairly and honestly with beneficiaries. Pet. App. 2a, 43a- 45a. Respondents further claimed that petitioner had failed to pay them the full life insurance benefits promised under the plan, in violation of the duty under Section 404(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1)(D), to administer the plan in accordance with its governing documents.

4. The district court granted summary judgment to petitioner on all claims. Pet. App. 47a-81a. In *Byrnes*, the court held that the pre-1987 SPDs "do not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired." *Id.* at 56a. The court concluded that the "reservation of rights clauses contained in [the 1987 SPD] and the VSOP and VIP documents are sufficient to negate any language cited by plaintiffs as evidence of a promise of vested benefits." *Id.* at 59a. In *Alicea*, the court further stated that the "exit letters and representations cited by the plaintiffs are at best extrinsic evidence and cannot be invoked to create an ambiguity which is not evident in the plan documents and SPDs themselves." *Id.* at 78a.

With respect to the fiduciary breach claims, the district court held that petitioner did not act as a fiduciary in amending the plan and did not otherwise breach its fiduciary duties because it did not mislead respondents

about their retiree life insurance benefits. Pet. App. 63a-65a, 79a. The court stated that ERISA does not require petitioner "to begin every communication with the plaintiffs by restating the caveat that it had reserved the right to change the life insurance plan." *Id.* at 65a.

5. a. The court of appeals reversed and remanded most of the claims in each case. Pet. App. 1a-46a. The court held that summary judgment on a benefit claim is improper, and that the plaintiffs should be allowed to introduce extrinsic evidence at trial, if there is language in plan documents that is "*capable of reasonably being interpreted* as creating a promise" to provide vested benefits. *Id.* at 12a (citation omitted). The court acknowledged that a conflict exists among the circuits on that issue and that the Fifth Circuit has held that only a "clear and express" promise and "precise language denying the right to withdraw benefits" will support a claim of vested employee welfare benefits. *Id.* at 10a-12a (quoting *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937-938 (5th Cir.), cert. denied, 510 U.S. 870 (1993)). The court explained that it had "rejected *Wise* twice before," however, and found no reason to adopt the Fifth Circuit rule in this case. Pet. App. 12a.

b. Applying its own decisional rule, the Second Circuit concluded in *Byrnes* that the pre-1987 SPDs could reasonably be interpreted as vesting lifetime life insurance benefits in employees when they became eligible for retirement upon completing twenty years of service and reaching age 55. Pet. App. 12a-15a. The court stated that petitioner's benefit provisions "can be construed as an offer that specifies performance as the means of acceptance." *Id.* at 13a. For employees who accepted this "offer" of benefits by beginning "perform-

ance" before 1987 and thereafter working "at least twenty years until attaining the age of 55," the court concluded that the 1987 SPD and the VSOP and VIP documents were not relevant because the benefits of those employees vested before those documents were adopted. *Id.* at 13a-14a & n.6.

In *Alicea*, however, the plaintiffs had disclaimed reliance on the pre-1987 SPDs, and the court of appeals held that the 1987 SPD is not ambiguous, for it contains a clear reservation of the right to amend or terminate benefits at any time. The court therefore upheld the award of summary judgment for petitioner against the normal retirees in that case. Pet. App. 36a-40a.

For the early retirees under the VSOP and VIP programs in *Alicea*, however, the court reversed the summary judgment for petitioner. The court held that the VSOP and VIP plan descriptions contain language that is reasonably capable of being interpreted as a promise of lifetime benefits and that the reservation of rights language in those documents is ambiguous rather than clear. Pet. App. 34a-36a. The court explained that the language of these plan descriptions was "capable of being interpreted to mean that [petitioner] merely reserved the right to change the [early retirement] *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms." *Id.* at 35a.

c. In both *Byrnes* and *Alicea*, the court of appeals reversed the award of summary judgment to petitioner on the fiduciary breach claims. Pet. App. 18a-23a, 43a-46a. The court noted that a violation of fiduciary responsibility under Section 404(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1)(D), could occur if an employer "violated the plan documents" by effecting a "discretion-

ary" reduction in vested benefits. Pet. App. 20a. The court further held that a violation of the fiduciary duty to deal honestly with plan participants under Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A), (B), could have occurred when petitioner "repeatedly describ[ed] its life insurance benefit as remaining constant for life." Pet. App. 21a. Without reaching the ultimate question of liability on these theories of fiduciary breach, the court remanded for the trial court "to evaluate Empire's communications with [respondents] for affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information." *Id.* at 21a-22a; see also *id.* at 43a-46a.

## DISCUSSION

Two of the questions presented warrant review by this Court at this time. The question of the proper legal standard for determining the vesting of employee welfare benefits (Question 1 as set forth in this brief) and the question of the permissible scope of the action for breach of fiduciary duty under ERISA (Question 2 in this brief) have created conflicts among the courts of appeals on matters of fundamental importance to plans and their participants. Although it appears that the court of appeals correctly decided each of these questions, review by this Court is warranted to resolve the circuit conflicts. Even though the ultimate merits of each claim have been remanded for trial, these two threshold legal questions require no additional factual development and are now ripe for review.

Two additional issues addressed by the court of appeals, however, require factual development by the parties and cannot properly be addressed on this incomplete record. In particular, the Court need not

review at this time the question whether a "discretionary" act by a plan administrator to reduce vested benefits (Question 3 in this brief) could violate a fiduciary duty under ERISA. There is no conflict on this issue or any holding or finding in this case that such a "discretionary" act occurred. Similarly, the question whether an affirmative misrepresentation or misleading description of plan benefits violates a fiduciary duty under ERISA (Question 4 in this brief) is not ripe for review because there is no clear conflict in the circuits, the issue is highly fact-sensitive, and the relevant factual record can be developed only on remand.

1. *The Legal Standard for Determining The Contractual Vesting of Employee Welfare Benefits.* a. Although ERISA does not itself mandate the vesting of welfare benefits, 29 U.S.C. 1051(1), an employer may provide vested benefits by contract. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997). As petitioner argues (Pet. 11- 15), and as the court of appeals recognized (Pet. App. 11a-12a), there is a persistent and well-developed circuit conflict over the standard for evaluating contractual vesting claims under ERISA welfare plans. This decisional conflict has substantial recurring importance, for its resolution is outcome-determinative in many cases, including the present one.

The Seventh, Eighth, and Eleventh Circuits agree with the Second Circuit that, if the language of the plan is ambiguous with respect to vesting, the plan participant may introduce relevant extrinsic evidence to establish the meaning of the plan. Pet. App. 12a; *American Fed'n of Grain Millers* v. *International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997); *Rosetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 546-547 (7th Cir. 2000), cert. denied, 531 U.S. 1192 (2001); *Bidlack* v. *Wheelabrator*

*Corp.*, 993 F.2d 603, 607-608 (7th Cir.) (en banc), cert. denied, 510 U.S. 909 (1993); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Stewart* v. *KHD Deutz of Am. Corp.*, 980 F.2d 698, 702-703 (11th Cir. 1993). Under the Second Circuit's formulation of this test, "a plaintiff need only 'point to written language *capable of reasonably being interpreted* as creating a promise' to survive an employer's summary judgment motion." Pet. App. 12a (citation omitted).

The Third, Fourth, Fifth, Sixth, and Tenth Circuits, however, have taken a different view. They hold that there must be "clear and express" language in the plan to defeat an employer's motion for summary judgment. *International Union* v. *Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999); *In re Unisys Corp.*, 58 F.3d 896, 902 (3d Cir. 1995); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), cert. denied, 514 U.S. 1057 (1995); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 937-938; *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc), cert. denied, 524 U.S. 923 (1998); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996). Those courts require plaintiffs to show "strong prohibitory or granting language" in plan documents, such as "precise language denying the right to withdraw benefits." *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 938.[3]

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[3] Recent regulations issued by the Secretary of Labor may yield less ambiguity in future plan documents. The Secretary is authorized to require that specific information be included in SPDs. 29 U.S.C. 1029(c). A regulation that is effective for plan years beginning in 2002 requires SPDs to summarize plan provisions that relate to the amendment or termination of benefits. 29 C.F.R. 2520.102-3(*l*). This regulation may reduce, but will not

Petitioner errs, however, in asserting (Pet. 15-16) that a separate circuit conflict exists on the question whether retiree welfare benefits can vest *before* an employee retires. No court of appeals has adopted a rule that retiree welfare benefits cannot vest before retirement. Indeed, the principal case cited by petitioner held that retiree welfare benefits can vest before retirement if the plan so provides in "clear and express" language. *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 937-938.[4] The court held in *Wise* that pre-retirement vesting could occur if the SPD included "precise language denying the right to withdraw benefits." *Id.* at 938. The question of pre-retirement vesting is thus merely an aspect of the general question of the standard for evaluating contractual vesting claims, on which there is a firm and acknowledged circuit conflict.

b. On the merits, the contractual-vesting test adopted by the Second Circuit is correct. This Court has made clear that employee benefits provided through ERISA plans are contractual in nature. "Nothing in ERISA requires employers to establish employee benefits plans" or "mandate[s] what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996). Benefits provided under an employee benefit plan are a "*quid pro quo* between the plan sponsor

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eliminate, vesting disputes in the future, and it does not affect disputes over the rights of current retirees.

[4] The other two cases cited by petitioner (Pet. 16) also do not hold that there is a general rule against pre-retirement vesting. See *Maurer* v. *Joy Techs. Inc.*, 212 F.3d 907, 915 (6th Cir. 2000); *Houghton* v. *SIPCO, Inc.*, 38 F.3d 953, 957 (8th Cir. 1994). Indeed, in *Maurer*, the court emphasized that "it is unlikely that [retirement] benefits * * * would be left to the contingencies of future negotiations." 212 F.3d at 915.

and the participant: that is, the employer promises to pay increased benefits in exchange for the performance of some condition by the employee." *Id.* at 894. ERISA is not designed to create benefits but "to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits." *Id.* at 887. See also *Helwig* v. *Kelsey-Hayes Co.*, 93 F.3d 243, 250 (6th Cir. 1996) ("[w]hen making decisions about where and how long to work, employees * * * rely on the promises made to them, particularly when those promises are in writing"), cert. denied, 519 U.S. 1059 (1997). ERISA therefore requires that benefits under pension and welfare plans be paid in accordance with the terms of the plan, unless doing so would conflict with some other provision of the Act. See 29 U.S.C. 1104(a)(1)(D), 1132(a)(1)(B).

Because employee benefits under ERISA are contractual in nature, it follows that disputes concerning the scope and content of the benefits provided should be resolved by reference to trust and contract principles. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court emphasized that principles of trust law and contract law are applicable in construing benefit provisions. *Id.* at 111-112. The Court explained that "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits." *Id.* at 113. By incorporating underlying principles of trust and contract law, ERISA ensures that "employees and their beneficiaries" are not "afford[ed] less protection * * * than they enjoyed before ERISA was enacted." *Id.* at 113-114.

It is, of course, an established principle of trust and contract law that extrinsic evidence may be considered in resolving ambiguities in the terms of the governing

documents. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 112-113; Restatement (Second) of Trusts §§ 4, 164 (1959); A. Scott & W. Fratcher, *The Law of Trusts* §§ 4, 164.1 (4th ed. 1988); Restatement (Second) of Contracts § 202 (1979); 5 *Corbin on Contracts* § 24.7 (rev. ed. 1998); J. Calamari & J. Perillo, *The Law of Contracts* § 3-10 (3d ed. 1987).[5] If a court finds ambiguity in the language of plan documents, it should therefore resolve that ambiguity by considering and weighing extrinsic evidence, ordinarily at trial. See Restatement (Second) of Contracts, *supra*, § 212 cmt. e; Fed. R. Civ. P. 56(c).

The interpretive approach applied by the Second, Seventh, Eighth and Eleventh Circuits comports with these traditional trust and contract principles. Conversely, the "clear and express" language requirement for determining welfare plan benefits under the decisions of the Third, Fourth, Fifth, Sixth, and Tenth Circuits lacks any basis in traditional trust and contract principles. No trust or contract principle requires a beneficiary to show a "clear and express" entitlement to a benefit.

Because ERISA is presumed to "afford [no] less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted" (*Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 113-114), the statute should not be interpreted to authorize a result that is harsher than those principles would authorize. A few courts have nonetheless attempted to find support for the "clear and express" vesting test in the fact that ERISA exempts employee *welfare* plans from the

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[5] In this case (as in many cases involving welfare benefits), the governing terms of benefits plans are set forth in the SPDs, the VSOP, and the VIP documents. See Pet. App. 3a-15a.

express vesting requirements that apply to employee *pension* plans under 29 U.S.C. 1051(1). See Pet. 13-15. That rationale is defective, however, because ERISA neither requires nor prohibits the vesting of welfare benefits. The statute leaves employers free to choose whether (and to what extent) to provide for such benefits and their vesting. *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). When a plan *does* provide vested welfare benefits, however, the employer may not then ignore its freely-adopted contractual commitments to employees. *Lockheed Corp.* v. *Spink*, 517 U.S. at 887. Nothing in ERISA establishes a special rule of construction under which employee welfare benefits vest only if plan documents so provide in "clear and express" language.[6]

The "clear and express" test should also be rejected for an additional reason: a plan sponsor can easily take steps to avoid misleading employees by specifying clear and specific benefits through a careful drafting of plan documents. For this same underlying reason, contract law generally endorses the principle that ambiguities are to be interpreted against the drafter. Restatement (Second) of Contracts, *supra*, § 206. As the Seventh Circuit stated in holding that extrinsic evidence may be considered in interpreting ambiguous employee benefit

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[6] Plaintiffs have the burden of proof on the issue of contractual vesting. *Jensen* v. *SIPCO, Inc.*, 38 F.3d at 949. Some courts have further held that, because there is no statutory vesting requirement for ERISA welfare plans, a presumption against vesting exists. *Rosetto* v. *Pabst Brewing Co.*, 217 F.3d at 544. Even under that analysis, however, the presumption "disappear[s] once evidence [is] introduced," and it does not "continue to weigh in the decision maker's balance after other evidence [comes] in." *Ibid.* Compare *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507-512 (1993).

provisions in *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d at 609, "[c]ourts do not sit to relieve contract parties of their improvident commitments."

2. *The Availability Of Fiduciary Remedies.* Petitioner errs in stating that this case presents the question whether respondents may pursue both welfare benefit claims under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), and fiduciary breach claims under Section 502(a)(3), 29 U.S.C. 1132(a)(3), for "the same alleged injury" (Pet. 20). Respondents do not allege a single, unitary injury. Instead, they allege two distinct injuries: one for being denied the benefits that they claim are owed under the terms of the plan; the other for misrepresentations by plan fiduciaries as to the benefits they are to receive. The question actually presented in this case is thus whether a participant may join a claim for benefits with a claim for misrepresentation about the benefits to be obtained under the plan.

In *Varity Corp.* v. *Howe*, 516 U.S. 489, 492 (1996), this Court held that plan participants may seek relief under Section 502(a)(3) for breaches of fiduciary duty from misrepresentations about plan benefits. In response to the suggestion that "lawyers will complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing" and "characterize a denial of benefits as a breach of fiduciary duty," the Court stated that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id.* at 514, 515. As petitioner notes (Pet. 20-24), this statement in *Varity* has led to a conflict among the circuits on the question whether participants may simultaneously bring claims under Section 502 of ERISA for benefits and for misrepresentation about benefits.

Some circuits have read *Varity* to preclude a fiduciary claim even when the related benefit claim is denied. *Tolson* v. *Avondale Indus., Inc.*, 141 F.3d 604, 610 (5th Cir. 1998); *Wilkins* v. *Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615-616 (6th Cir. 1998). In the *Tolson* case, the Fifth Circuit expressly held that plan participants and beneficiaries cannot assert a fiduciary breach claim for misrepresentation under Section 502(a)(3) whenever they *can* assert a benefit claim under Section 502(a)(1)(B). 141 F.3d at 610.[7]

The Second Circuit expressly rejected that view in this case.[8] It held that *Varity* "did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate." Pet. App. 23a. The fiduciary breach alleged here is a claim that petitioner misled respondents about the nature of their benefits.

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[7] Although the decisions of the First and Ninth Circuits cited by petitioner (Pet. 22-23) rely on *Varity*, they do not conflict directly with the Second Circuit's holding in this case. In *LaRocca* v. *Borden, Inc.*, 276 F.3d 22, 25, 28 (1st Cir. 2002), the plaintiffs had already obtained relief on their benefit claims by stipulation, and the only remaining question was whether additional equitable relief would be "appropriate." In *Bowles* v. *Reade*, 198 F.3d 752, 759-760 (9th Cir. 1999), the court similarly held that a fiduciary claim would not be allowed when "another section of ERISA already provided * * * an adequate remedy."

[8] The Third and Seventh Circuits, while not addressing the question explicitly, have routinely allowed plaintiffs to pursue both benefit claims and misrepresentation claims to judgment. See, *e.g.*, *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Jordan* v. *Federal Express Corp.*, 116 F.3d 1005 (3d Cir. 1997); *Kamler* v. *H/N Telecomms. Servs., Inc.*, 305 F.3d 672 (7th Cir. 2002); *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000).

That claim is clearly distinct from the Section 502(a)(1)(B) claim that the SPDs, VSOP, or VIP provided vested benefits by their own terms. If the benefits claim fails, the breach of fiduciary duty claim is then the only possible remedy. *Id.* at 22a. The court of appeals correctly held that it is only when a benefit claim is *successful* that the court would be required to determine whether additional, equitable "relief" for a misrepresentation claim under Section 502(a)(3) would then be "appropriate." Pet. App. 23a.

Petitioner's contrary interpretation of *Varity* is inconsistent with ordinary principles of civil procedure, which permit the joinder of alternative—and even inconsistent—claims in a single action. Fed. R. Civ. P. 8(a), 8(e)(2); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 1221, 1282, 1283 (2d ed. 1990); 2 J. Moore, *Moore's Federal Practice* § 8.09[2] (3d ed. 2002). It is also inconsistent with the goal of ERISA to provide "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Although the Second Circuit thus appears correct in its interpretation of *Varity*, review by this Court is warranted to resolve the circuit conflict on this recurring issue.

3. a. *A Discretionary Act Of A Plan Administrator Is Subject To Fiduciary Obligations.* Petitioner asserts that the court of appeals improperly held that the action of an employer in modifying a welfare plan may constitute a "fiduciary act." Pet. 24. The court, however, made no such holding in this case. Instead, the court reiterated the established rule that "[a]n employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary." Pet. App. 20a (citation omitted). See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443-446 (1999); *Lockheed Corp.* v. *Spink*, 517

U.S. at 890-891. The court stated, however, that a reduction of vested benefits may not involve merely the amendment of an existing plan and that the employer may have exercised "discretionary authority" under the plan in reducing *vested* benefits. Pet. App. 20a. The court noted that an employer that exercises "discretionary authority" in administering a plan acts as a fiduciary and may be liable if its actions "violate[] the plan documents." *Ibid.*

That ordinary description of the fiduciary obligation of a plan administrator does not create any conflict among the circuits or with any decision of this Court.[9] Moreover, there is no finding or holding that any such "discretionary" act in the administration (as distinguished from the amendment) of the plan occurred in this case. Petitioner's request for review of this question on the merits is thus hypothetical and premature.

b. *Misrepresentation Is A Breach Of Fiduciary Duty.* The other question relating to fiduciary duties that petitioner seeks to raise is whether "an ERISA plan fiduciary's failure to disclose the fact that welfare plan benefits are not vested can itself constitute a breach of fiduciary duty" (Pet. 28). That, however, is also not an accurate description of the holding of the court of appeals in this case.

The court of appeals directed the district court on remand to "permit a trier of fact to evaluate Empire's communications with plaintiffs for affirmative misrepresentations regarding plan benefits and for failure to

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[9] In the decisions cited by petitioner (Pet. 26-27; Reply Br. 9), by contrast, the courts held only that the plan amendment was not a fiduciary act. See *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990); *Wulf* v. *Quantum Chemical Corp.*, 26 F.3d 1368, 1377-1378 (6th Cir.), cert. denied, 513 U.S. 1058 (1994).

provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire breached it." Pet. App. 21a-22a. That holding is unexceptionable, for this Court expressly held in *Varity Corp.* v. *Howe*, 516 U.S. at 498-507, that affirmative misrepresentations about plan benefits may constitute a breach of fiduciary duty under ERISA. *Id.* at 506-507.

The allegedly inconsistent cases that petitioner cites (Pet. 28-30) stand for a more limited and quite different proposition. They hold that, because the reporting and disclosure provisions of ERISA do not require SPDs to address the vesting of welfare benefits (see 29 U.S.C. 1022), the absence of any such disclosure does not *by itself* establish a per se violation of any fiduciary duty. *Jensen* v. *SIPCO, Inc.*, 38 F.3d at 952; *Gable* v. *Sweetheart Cup Co.*, 35 F.3d at 858; *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 934-937. Nothing in the decision in this case conflicts with those decisions or even addresses that issue.

For example, petitioner argues (Pet. 29) that the decision below conflicts with *Sprague* v. *General Motors Corp.*, 133 F.3d at 405, which held that a breach of fiduciary duty is not established merely by the fact that "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." In the present case, the court of appeals did not hold that this fact, by itself, would establish a breach of fiduciary duty. Instead, the court remanded the case for the district court to determine whether petitioner engaged in "affirmative misrepresentations." Pet. App. 21a-22a. That remand order does not conflict with the more limited holding of *Sprague*. To the contrary, on the proposition actually

addressed by the court of appeals in this case, there is general agreement that a fiduciary duty exists under ERISA for employers (i) to answer specific questions accurately and (ii) to provide relevant information to plan participants even when the participants have not framed or asked the fiduciary precisely the right question. See, *e.g.*, *Griggs* v. *E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 380-381 (4th Cir. 2001); *In re Unisys Corp.*, 57 F.3d 1255, 1264 (3d Cir. 1995), cert. denied, 517 U.S. 1103 (1996); *Anweiler* v. *American Elec. Power Serv. Corp.*, 3 F.3d 986, 991-992 (7th Cir. 1993); *Eddy* v. *Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 751 (D.C. Cir. 1990). Indeed, in *Sprague* v. *General Motors Corp.*, 133 F.3d at 406, the court expressly reserved the possibility of liability in precisely such situations.[10]

There is thus no well-framed conflict among the circuits on the question of the scope of the fiduciary duty of disclosure under ERISA. And, at this stage of this case, there is no holding that any such violation occurred. Because the facts that relate to the ultimate question of liability on the merits have not yet been

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[10] One frequently cited formulation of that duty, relied on by the court below (Pet. App. 21a), is set forth in *In re Unisys Corp.*, 57 F.3d at 1264: "when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." That formulation is consistent with a trustee's duty "to inform the beneficiary of important matters concerning the trust" and to provide "the beneficiary * * * all information about the trust and its execution for which he has any reasonable use." G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 961 (rev. 2d ed. 1983); see also Restatement (Second) of Trusts, *supra*, § 173 cmt. d.

developed in this case, that issue is not ripe for resolution in this Court.

## CONCLUSION

The Court should grant the petition for a writ of certiorari limited to Questions 1 and 2 set forth in this brief.

Respectfully submitted.

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JANUARY 2003

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** The Solicitor General is recused in this case.

Supreme Court U.S.
FILED
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No. 01-1710

IN THE

# Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

JOHN F. BYRNES, ET AL.,

*Respondents.*

EMPIRE BLUE CROSS AND BLUE SHIELD,

*Petitioner,*

v.

IRMA M. ALICEA, ET AL.,

*Respondents.*

**On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL BRIEF FOR PETITIONER

In its *amicus curiae* brief, the United States acknowledges that this case presents multiple "conflicts among the courts of appeals on matters of fundamental importance to plans and their participants" that "warrant review by this Court at this time." U.S. Br. 7. The United States takes the position that "[t]he Court should grant the petition for a writ of certiorari," but limited to two questions as reframed by the government. *Id.* at 20. Empire agrees with the United States that the questions identified by the government merit review by this Court. Empire respectfully submits, however, that the phrasing of the questions presented in the petition more fully and accurately reflects the specific conflicts of authority at issue, and a grant of certiorari to review these questions would protect this Court's ability to consider and resolve all aspects of the important issues implicated by the decision below. Moreover, the government's contentions that three of the subsidiary issues addressed in the petition are not presented in this case or are not the subject of a circuit split are based on a strained and untenable reading of the decision below and the relevant case law. The questions set forth in the petition, including subsidiary issues, are plainly presented here and involve mature splits of authority among the circuit courts. The petition should be granted in its entirety in order to provide the Court with an unfettered opportunity to consider the important questions raised by this case.

### I. The First Question Presented, Encompassing Two Subsidiary Circuit Splits Concerning Vesting Of Welfare Plan Benefits, Merits Plenary Review

1. The first subsidiary issue encompassed within the first question presented in the petition is whether "clear and express language" is required to create vested ERISA welfare plan benefits. The United States agrees that this issue has divided the circuits and warrants this Court's review. U.S.

Br. 8-9. The government, however, has proposed an alternate phrasing of this question that focuses on the admissibility of extrinsic evidence to aid in interpreting ambiguous plan language. *Id.* at 1 (sic) (question 1). The evidentiary issue identified in the government's alternative question presented is clearly subsumed within the first question presented by Empire, but the question as worded in the petition more appropriately encompasses the entirety of the substantive test for vesting of benefits, rather than focusing primarily on an evidentiary rule. The overarching question for this Court to decide, and the specific issue that has divided the courts of appeals, is whether ambiguous plan language can give rise to *vested* benefits. The government, by contrast, has chosen to focus on the anterior and corollary evidentiary consequences that would follow a ruling on the core issue. The question as framed by Empire warrants this Court's review.[1]

[1] On the merits, Empire's position on this issue is supported by a majority of the circuits that have considered the issue. The minority approach followed below and advocated by the government ignores, among other things, the decision by Congress to treat vesting of *pension* and *welfare* benefits very differently under ERISA. Unlike pension plans, in which either the benefit or contribution is defined, thereby enabling an employer to predict costs and to plan for such benefits in the future, the costs of welfare benefits fluctuate widely and are inherently unpredictable. A rule that results in undue vesting of welfare plan benefits is contrary to the desire by Congress "to keep [] costs within reasonable limits [and to avoid] placing . . . a burden on employers [that] would inhibit the establishment of such plans." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990) (internal quotation marks and citations omitted). The minority approach also ignores the common-law tradition of at-will employment and the resulting expectation that welfare benefits are subject to change at the will of the employer, which the enactment of ERISA in no way altered. More importantly, by shifting the inquiry away from plan documents to a limitless array of miscellaneous "extrinsic evidence," the minority approach greatly complicates the task of plan administration. "As a matter of statutory policy, ERISA places great weight on the written terms of the formal plan documents," because of the need for "predictability as to an employer's future obligations." *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994).

**2.** The second subsidiary issue encompassed within the first question presented is whether, even assuming plan language sufficient to give rise to vested welfare benefits upon retirement, retiree welfare benefits vest *before* or *upon* retirement. At stake is whether an employer has the right to amend a welfare plan by expressly reserving the right to modify or to eliminate future retirement welfare benefits. Although the United States takes the position that there is no split of authority on this issue,[2] the government mischaracterizes the ruling below and the contrary holdings of three other circuits.

The United States attempts to minimize the importance of this issue by contending that "[n]o court of appeals has adopted a rule that retiree welfare benefits *cannot* vest before retirement." U.S. Br. 10 (emphasis added). That argument, however, merely sidesteps the split of authority by ignoring the issue actually presented. To be sure, no court has taken the position that employers *cannot under any circumstances* provide retirement welfare benefits that vest before retirement—such as through a clear statement in plan documents granting vested retirement benefits and stating that for current employees the employer will not alter the retirement benefits package at any time before or after those employees retire—but that type of plan language is absent here and has nothing to do with the issue presented.

Instead, the court below expressly held that the *same* ambiguous plan language that purportedly entitled respondents to a trial concerning whether welfare benefits vested upon retirement could *also* prevent Empire from modifying the plan with respect to then-current employees *who had not yet retired*. Pet. App. 12a-15a. The court based this holding

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[2] The United States concedes that this subsidiary issue is included within the scope of the "question of the standard for evaluating contractual vesting claims, on which there is a firm and acknowledged circuit conflict." U.S. Br. 10.

on the doctrine of unilateral contract and the concept that respondents "accepted" the supposed offer of retirement benefits by working for Empire. *Id.* at 13a. The result was a rule that where a plan confers benefits that vest upon retirement, current employees may automatically obtain the vested and irrevocable right to retire with those same benefits at any point in the future.

That position has been rejected by three other circuits. *See Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000) (affirming summary judgment for employer where employees retired after plan amendment reducing retiree insurance benefits); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994) (reversing judgment in favor of employees under similar circumstances); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 936-37 (5th Cir. 1993) (affirming summary judgment for employer under similar circumstances). Thus, the question whether retirement welfare benefits vest before retirement in the absence of plan language specifically addressing pre-retirement vesting is important, squarely presented on this record, and the subject of a clear disagreement among the courts of appeals.

## II. The Second Question Presented, Encompassing Three Subsidiary Circuit Splits Concerning ERISA Fiduciary Duties, Merits Plenary Review

1. The first subsidiary issue encompassed within the second question presented in the petition is whether a plaintiff may pursue both a claim for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and a claim for denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to address the same injury. The United States agrees that "review by this Court is warranted to resolve the circuit conflict on this recurring issue." U.S. Br. 16. The government, however, proposes a different phrasing of the question, focusing on whether "plan participants may combine, in a single action, a claim for benefits . . . and a

claim for breach of fiduciary duty based on the misrepresentation of plan benefits." *Id.* at 1 (sic) (question 2). The government argues for this alternative formulation because, in its view, respondents allege "two distinct injuries" in their benefits and fiduciary duty claims: denial of benefits under the terms of the plan and misrepresentation of the benefits respondents would receive. *Id.* at 14.

The government's attempt to reframe this issue is based on a misreading of the decision and record below. Respondents do not, as the government contends, base their fiduciary duty claim solely on alleged misrepresentations. Instead, the theory advanced by respondents and adopted by the court below is that "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. *It therefore follows that* . . . Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn, [the fiduciary duties imposed by] ERISA § 404(a)(1)(D)." Pet. App. 20a (emphasis added). Thus, respondents' fiduciary duty claim is inextricably intertwined with their § 502(a)(1)(B) claim for "vested" benefits. The government's contrary characterization of the issue simply ignores the substantial overlap between respondents' claims for benefits and for breach of fiduciary duty and thus does not fully address the factual and legal context presented by this case. This issue, as framed in the petition and encompassed within the second question presented, has divided the circuits and warrants this Court's review. Pet. 20-24.[3]

**2.** The second subsidiary issue encompassed within the second question presented in the petition is whether an em-

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[3] On the merits, Empire's position on this issue accords with the view of a majority of courts of appeals that have considered the matter. The government's view is inconsistent with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996), and with the salutary policy of focusing ERISA litigation, to the extent possible, on claims for benefits. Pet. 20-24.

ployer's amendment of an ERISA welfare plan constitutes a fiduciary act, an issue as to which the holding below conflicts with case law from this Court and three other circuits. Rather than addressing the question raised by Empire, however, the government posits an entirely different straw-man issue that does not accurately describe the decision below, and then purports to demonstrate why *that* issue is not worthy of this Court's review. The government's analysis rests entirely on its assertion that the court of appeals did *not* hold that "the action of an employer in modifying a welfare plan may constitute a 'fiduciary act.'" U.S. Br. 16. The government's assertion is demonstrably incorrect, and its objections to review of this issue therefore fail.

As the court of appeals recognized, respondents' "breach of fiduciary duty claim under ERISA § 404(a)(1)(D) alleges that Empire, in reducing their life insurance coverage to $7500, failed to act in accordance with the life insurance plan documents." Pet. App. 19a. In order for that reduction in benefits to be actionable as a fiduciary breach, respondents had to demonstrate that Empire's conduct in amending the plan to reduce benefits could constitute a fiduciary act. Notwithstanding this Court's repeated recognition that plan amendment is not a fiduciary act (*see* Pet. 25), the court below expressly held that Empire's conduct in amending the plan to reduce benefits *could* constitute a fiduciary act: "[W]e reject both Empire's assertion and the district court's conclusion that Empire was not acting in a fiduciary capacity when it reduced [respondents'] life insurance benefits." Pet. App. 19a. The court reasoned that "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits," and "[i]t therefore follows that . . . Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn," ERISA fiduciary duties. *Id.* at 20a. Thus, according to the court below, the act of plan amendment itself can constitute a fiduciary act, at

least as long as it "may have violated the plan documents." *Id.*

In light of the clear language used by the court below, the government's assertion that "[t]he court . . . made no such holding in this case," U.S. Br. 16, is patently incorrect. By the same token, the government's focus on whether a decision was "discretionary" is entirely inapt. *Id.* at 17. The court of appeals' reference to "discretionary" conduct was merely its attempt to justify its holding that plan amendment (which is certainly within the "discretion" of the employer) can constitute a fiduciary act, since the definition of "fiduciary" requires the exercise of "discretionary authority" with respect to plan management, plan assets, or plan administration. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *see* Pet. App. 19a-20a. But the court of appeals did *not* hold, as the United States suggests, that there was or may have been some "discretionary" act *other* than plan amendment that triggered fiduciary status; to the contrary, the court below made quite clear that the only "discretionary" act at issue *was* "Empire's decision to reduce benefits"—i.e., its decision *to amend the plan*.[4] Pet. App. 20a. Thus, the government's attempt to distinguish the "discretionary" act from plan amendment is conclusively refuted by the decision below, which unambiguously holds that plan amendment can be a

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[4] Tellingly, the government is wholly unable to explain what mysterious "discretionary" act *other* than plan amendment the court of appeals was supposedly contemplating. Indeed, the government goes so far as to note that "there is no finding or holding that any such 'discretionary' act in the administration (*as distinguished from the amendment*) of the plan occurred in this case." U.S. Br. 17 (emphasis added). That is true, but only because the court of appeals was not engaged in imagining some hypothetical "discretionary" act *distinct* from plan amendment. Rather, the court of appeals made perfectly clear that the "discretionary" act it considered sufficient to support a claim for fiduciary breach was "Empire's decision to reduce benefits," and that decision alone. Pet. App. 20a. The government's claim to the contrary is sheer sophistry.

fiduciary act. As the government tacitly admits, and as the petition persuasively demonstrates (Pet. 25-27), that holding squarely conflicts with precedent of this Court and of the Third, Sixth, and Seventh Circuits.

The government has badly misread the decision below, perhaps in order to avoid the necessity of conceding that the court of appeals' holding on this issue is simply indefensible. There is nothing "hypothetical" or "premature," U.S. Br. 17, about Empire's request for review on this question. The court of appeals held that respondents can pursue their claim for fiduciary breach predicated on conduct—the amendment of an ERISA plan—that *as a matter of law* cannot constitute a fiduciary act and thus *cannot* be actionable as a fiduciary breach. This issue is squarely presented on this record, involves a clear conflict of authority with the decisions of this Court and of several courts of appeals, and merits review by this Court.

**3.** The third subsidiary issue encompassed within the second question presented in the petition is whether an employer has a duty to disclose the non-vested nature of ERISA welfare plan benefits in every communication to plan participants that refers to those benefits, even when the plan documents expressly set forth the employer's right to amend or to terminate those benefits. The government opts to frame the issue as "[w]hether an employer breaches a fiduciary duty under ERISA by promising lifetime welfare benefits to employees without fairly and clearly disclosing that it reserves the right to change or terminate those benefits." U.S. Br. 1 (sic) (question 4). That statement of the issue, as well as the government's analysis, fails to address the question that Empire has raised, the facts of this case, the actual ruling below, or the clear division of authority among the courts of appeals. The government's position that its own issue, as reformulated, is not worthy of review is irrelevant, because the question actually presented by Empire merits plenary review.

The alleged "misrepresentation" in this case involves Empire's statements in various documents that retirees will receive lifetime welfare plan benefits, without reiterating in each of those documents that the benefits (like welfare benefits generally) are subject to modification or termination. As noted in the petition, Empire clearly disclosed in its 1987 and subsequent summary plan descriptions that the company "reserves its right to end" or "to amend . . . the Plan[] at any time." Pet. 4-5 (quoting Pet. App. 5a-6a). According to the court of appeals, "Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits *but failed to note that Empire could reduce or terminate these benefits at any time.*" Pet. App. 21a (emphasis added).

Thus, the court of appeals expressly held that Empire's failure to disclose that it "could reduce or terminate these benefits at any time" could give rise to a fiduciary breach when coupled with references to "lifetime" benefits. *Id.* As demonstrated in the petition, that holding squarely conflicts with the decisions of other courts of appeals. In *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), for example, the employer ("GM") offered its employees "lifetime" health care benefits but also reserved its right in certain plan documents to amend or to terminate its benefits plan. *Id.* at 394. GM told employees "that their coverage was to be paid by GM for their lifetimes," but did *not* tell them "at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Id.* at 405. The Sixth Circuit expressly held that "GM's failure to begin every communication to plan participants with a caveat" was not actionable as a fiduciary breach, and that an employer is "not required to disclose in its summary plan descriptions that the plan was subject to amendment or termination." *Id. See also Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950-52 (8th Cir. 1994) (notwithstanding description of lifetime benefits, "a welfare plan SPD is not required

to disclose that plan benefits are not vested"), *aff'g* 867 F. Supp. 1384, 1389-90 (N.D. Iowa 1993) (specifying lifetime benefits).

This issue is squarely presented by the decision below, reflects a clear circuit split, and merits this Court's review.

## CONCLUSION

The petition for writs of certiorari should be granted.

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IN THE

# Supreme Court of the United States

EMPIRE HEALTHCHOICE, INC.,

*Petitioner,*

*v.*

JOHN F. BYRNES, *et al.*,

*Respondents,*

-and-

IRMA M. ALICEA, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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We are writing for the purpose of advising the Court that we endorse the arguments and conclusions set forth in the Brief of the United States as Amicus Curiae, with one reservation. While we agree with the substance of the arguments set forth in the government's brief, we do not believe that certiorari is warranted in this particular case for the following reasons:

1. Denial of the writ will leave standing the decisions of the Second Circuit with which the United States is in accord; and that would be the law of the Second Circuit, which all other circuits will be free to follow or adopt;

2. The Second Circuit's opinion on the fiduciary issue follows this Court's holding in *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and

3. A decision on the particular facts of this case (which involves life insurance – the cost of which is readily and predictably determined) would not open the floodgates of litigation, because under the facts of this case, regardless of which standard the Court applies on the contractual issue, the respondents should prevail.

Petitioner attempts to deflect the Court's attention from the clear and rational reasoning of the government's arguments by arguing that welfare plan benefits differ from pension benefits. This argument utterly misses the point. The question is not whether welfare benefits should be treated differently than pension benefits. The question here is whether, if an employer voluntarily offers vested benefits in return for longtime service, the employer is to be held to its

contractual obligation. Petitioner's efforts, noted by the government, to misinterpret prior case holdings and to intertwine a multitude of non-issues into the questions presented, cannot alter the basic case law and conclusions set forth in the government's brief.

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